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The case of Hickey v. O'Brien, 82 N. W. Rep. 241, recently decided by the Supreme Court of Missouri, is in line with the principle contended for by Professor Lawson in his article in a late issue of the JOURNAL (see 50 Cent. L. J. 329). In this case a firm engaged in the business of selling ice agreed to purchase from another firm, who were ice cutters and storers, all the ice necessary to carry on their business for five years. In an action where it was contended that the promise was void for want of mutuality, the agreement was sustained as valid and enforceable. The court refused to follow the conflicting cases of Bailey v. Austman, 19 Minn. 535; Drake v. Vorse, 52 Iowa, 417, but approves the decision in National Furnace Co. v. Keystone Manuf. Co., 110 Ill. 427.

The Supreme Court of Nebraska, in the case of Henderson v. U. S. National Bank, 80 N. W. Rep. 898, declares the law of that State to be that a check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof—in effect, an assignment of the amount of the check—and the holder, upon refusal of the bank to pay the same, where such funds have not been drawn out before its presentation, may bring an action thereon in his own name. This is contrary to the rule adopted in Pennsylvania and most of the States. In the Nebraska case, however, the court refused to apply the rule, holding that the fact that the check was for an amount greater than the deposit, prevented it from operating as an assignment. From a logical standpoint it is hard to see how this fact makes any difference, and it would seem that the case of Bromley v. Bank, 9 Phila. 522, cited with disapproval by the Nebraska court, reaches a more reasonable conclusion on this point.

There is urgent need of a new and complete revision of the statutes of the United States. It is now over a quarter of a century since a complete revision of our national legislation was made. The last revision was made at the first session of the forty-third congress in 1873-74. A new edition of the revised statutes was, it is true, prepared in 1878, but it is well known that this was not intended as in any sense a new revision of the statutes. The jurisdiction of the commissioner charged with the execution of the work was strictly limited by the statute under which he acted. He was directed to incorporate into the text of the first edition all the amendments made since December 1, 1873, including those made by the forty-fourth congress, together with marginal references to the amending acts and to the decisions rendered by the United States courts, and like references to all the statutes passed in the same period which, in his judgment, might in any manner affect or modify any of the provisions of the edition of the revised statutes of 1874. Beyond this, and the inclusion of certain important historical documents not printed in the earlier edition, his authority did not extend. He was not authorized to change the substance or to alter the language of the existing edition, nor to correct any errors or to supply any omissions therein, except as authorized by the several statutes of amendment. Substantially, therefore, the work was not a real revision, but a new edition of a revision. Supplements have been issued since the appearance of the edition of 1878, but, as is the case with such continuations usually, they are inconvenient in use and are, as a matter of fact, antiquated.

An amusing item is going the rounds of the legal journals concerning a case pending in the Supreme Court of Iowa. It seems that a law firm of which the senior member was recently chief justice, appeared as attorneys in a case wherein the law as declared by the chief justice whilst occupying that position was dead against the law as now contended for by him. Hence the langage of the brief, filed by them: "We recognize the fact that the senior member of the firm, the name of which is subscribed hereto, among his last official duties as chief justice of this honorable and respected court, wrote the decision in the case of Ottumwa v. Stodgill, reported in 103 Iowa, 437, in which this court held that a transfer of stock in a corporation is invalid as against an attaching creditor, even though he has actual notice of the transfer, when the transfer is not entered upon the

books of the corporation in the manner provided by Section 1078 of the Code of 1873. Since that case was decided the junior members of the firm have labored long and earnestly with the senior member to convince him of the error of his decision. We have shown him that it is based upon a harsh, strict and literal interpretation of the statute; that it is contrary to equity and good conscience, and opposed to the trend of modern and enlightened authority. We have pointed out to him that he wrote it as the shades of night were falling upon his judicial career, and that his theretofore clearsightedness in legal matters had become temporarily dimmed, and that he is now in the bright light of a free and unhampered advocate, and more capable of seeing things in their proper proportions. We have even quoted to him the speech of Mrs. Browning's maiden to her lover:

'Yes—I answered you last night.
No—this morning, sir, I say.
Colors seen by candle light
Do not seem the same by day.'

In short, though he has never said so in words, we are convinced that the ex-chief justice is heartily ashamed of that narrow, almost mediæval, decision, and that all we have to do is to present the question to his successor, and five associates, in a proper manner to convince them also that the rule promulgated in the Ottumwa case is not the law."

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—WASTE OF NATURAL GAS AND OIL.—In Ohio Oil Company v. The State of Indiana, 20 S. C. Rep. 570, recently decided by the Supreme Court of the United States, it was held that a statute of Indiana, providing that it shall be unlawful to permit the flow of gas or oil from a well to escape into the open air, without being confined within the well, or proper pipes, or other safe receptacle, for more than two days after gas or oil shall have been struck in the well, does not take private property of the owners of the land without adequate compensation, and therefore without due process of law, since the owner of the surface has no property right in the gas or oil until he has actually reduced it to possession, or, if he has any property right therein, it is a right in common with the rights of other landowners to take from the common source of supply, and therefore subject to the legislative power to prevent a destruction of the common property by one of common owners.

In the decision of this case an analogy between the rules of law applicable to animals, *ferœ naturæ*, was pointed out and in part relied on. Such analogy applies in so far as natural gas and oil tend to circulate beneath the surface of the earth from the holding of one proprietor to another, in like manner as wild animals move from place to place above the earth's surface. The supreme court, however, while conceding the partial analogy, points out that the legal *status* of animals *ferœ naturæ* is not identical with that of subterranean liquids or gaseous products. In elucidation and limitation of the scope of the analogy, the court said:

"But, whilst there is an analogy between animals *ferœ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals *ferœ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferœ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, everyone may be absolutely prevented from seeking to reduce to possession. No devesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. Geer v. Connecticut, 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common

source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *ferœ naturœ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public to reduce to possession, may be ultimately efficaceously enjoyed."

In an earlier Pennsylvania case, Hague v. Wheeler, 27 Atl. Rep. 714, although the right of one landowner to an injunction against another landowner for alleged waste of natural gas was denied, the authority of a legislature to enact regulations for the common good and general benefit was practically conceded.—*New York Law Journal.*

JUDICIAL SALE — "PUFFERS" — AGREEMENT WITH ANOTHER TO RUN UP PRICE.—An opinion which exhibits much research and examination of authorities has been rendered by the Supreme Court of Georgia, in McMillan v. Harris, 35 S. E. Rep. 334, involving the validity of "puffing" bids at judicial sales. The conclusion of the court may be briefly summarized as follows: One who bids at a public sale, not because of any desire to purchase, but merely for the purpose, either in his own interest or that of another, to run up the price, is not a "puffer," if, in case his bid is the last and highest, he can be compelled by the person conducting the sale to take and pay for the property; and this is so though, under an arrangement with another or others to whom the proceeds of the sale, or a considerable portion thereof, will ultimately go, he will not be compelled to keep and pay for the property. Accordingly, it is neither contrary to law nor public policy for persons who will be entitled to the proceeds of land sold by an executor under a decree of court to engage a third person to run the property up to a specified price, with the understanding that, if it is knocked down to him, they will take it off his hands.

WATER SUPPLY — FIRE PROTECTION — CONTRACTS—BREACH.—It is held by the Court of Errors and Appeals of New Jersey, in the case of Knappman-Whiting Co. v. Middlesex Water Co., 45 Atl. Rep. 692, that a water company which unconditionally contracts to supply to a consumer water with pressure sufficient for fire purposes is liable for damages sustained by the consumer from fire in consequence of a failure in the water pressure, though the failure is due to a break in its pipes without the water company's fault. It will be noted that cases like Nickerson v. Hydraulic Co., 46 Conn. 25, Beck v. Water Co. (Pa. Sup.), 11 Atl. Rep. 300, and Boston Safe-Deposit & Trust Co. v. Salem Water Co. (C. C.), 94 Fed. Rep. 238, which holds that, where the contract of the water company is with the city, no privity of contract exists between the water company and an inhabitant of the city whose property was destroyed by fire, to lay the foundation of an action against the company, do not apply to this case. The water company by this agreement in express terms contracted with the defendant to furnish to it water suitable for drinking purposes and other domestic uses, and for use in steam boilers, and with a pressure sufficient for fire purposes; the manufacturing company stipulating in the same connection that it would take water for a supply of its factory and for fire purposes for the period of five years, and pay for it the stipulated price. The construction of the agreement is free from doubt. The premises to which the contract related were a factory, with its contents. The enumeration in the contract of the purposes for which the water was contracted for comprehends the supply of water appropriate to and adequate for all the enumerated purposes. The construction of this agreement by the learned judge at the trial presents the merits of this controversy. His instruction was as follows: "Under this agreement there is no express contract by the water company that it will furnish water uninterruptedly for five years to the defendant. There is no agreement that an unavoidable accident will not happen, causing temporary stoppage of the water supply; but the agreement on the part of the defendant to take water and pay for it imposed on the water company the duty of exercising reasonable care in the construction and maintenance of the waterworks in such a way as to give a proper supply of water to the defendant during the term of five years. If, therefore, the water company was guilty of any negligence in these respects, it is liable for such damages as proximately resulted from such negligence." On this construction of the agreement the judge directed a verdict for the plaintiff. To this ruling the defendant excepted. The agreement contained an express contract to furnish water for fire purposes, without condition or qualification. The learned judge, by his construction, introduced into the agreement a qualification that would exempt the water company from performing its agreement in cases where, without negligence on its part, the supply of water was cut off. To sustain this construction counsel rely mainly on Foundry Co. v. Hovey, 21 Pick. 417. The

court of errors, upon a review of this case, held that its actual decision was upon an issue not in the present case, and that the principle adopted by the Massachusetts court, so far as it is applicable to this litigation, is adverse to the claim of the water company. They cite Railroad Co. v. Hoyt, 149 U. S. 1, 13 Sup. Ct. Rep. 779, as being more pertinent to the issue here. After an interesting review of the leading cases on the subject, the New Jersey court concluded that the construction of the agreement by the trial court was erroneous, and therefore reversed the case.

SHEEP KILLED BY DOGS—LIABILITY.—In Nelson v. Nugent, 82 N. W. Rep. 287, decided by the Supreme Court of Wisconsin, it was held that, under the Revised Statutes of Wisconsin, section 1620, making the owner of a dog responsible for any damage caused by his dog worrying or killing sheep, an instruction that each owner of a dog is liable for the whole amount of damages sustained, where his dog engaged in killing sheep, though another's dog may have also participated in the killing, was proper, since it is manifestly impossible to apportion the damages in such a case. The court said in part:

"This action is based upon section 1620, Rev. St., 1898, which is as follows: 'The owner or keeper of any dog which shall have injured or caused the injury of any person or property or killed, wounded or worried any horses, cattle, sheep or lambs shall be liable to the person so injured and the owner of such animals for all damages so done, without proving notice to the owner or keeper of such dog, or knowledge by him that his dog was mischievous or disposed to kill, wound or worry horses, cattle, sheep or lambs.' The court charged the jury that 'each owner of a dog which is concerned in or engaged in the killing, wounding and worrying of sheep is liable for the whole amount of damages which his dog was concerned or engaged in doing.' This is said to be erroneous, and the rule is asserted to be that, when dogs of different owners unite in killing sheep, the wrong is not a joint wrong, but each owner must be sued separately for the damage done by his own dog. Cooley, Torts, 338. As we read it, the statute has changed the common-law liability of the owners of dogs for injuries done by them. The object of the statute seems to have been to 'encourage the raising of sheep, and to discourage the raising of dogs.' The danger of damage to sheep from dogs, and the difficulty of protecting flocks, is so great that it was deemed necessary to adopt stringent measures for that purpose. It is a well-known fact that dogs which have the propensity of killing sheep often travel in pairs, and make their attacks together. It is practically impossible, in most cases, to tell what damage was done by one dog, and what by the other. The difficulty of apportioning the damage led the legislature to adopt the language set forth in the statute, making the owner or keeper of a dog doing injury to sheep liable for all the damage so done. The circumstance that another dog was engaged in the same act does not lessen the liability, unless we are able to apportion the damages done by each dog. The impossibility of doing so is manifest. It cannot be done unless some arbitrary rule is adopted, as was done in a few of the cases cited by the defendant. Partenheimer v. Van Order, 20 Barb. 479; Powers v. Kindt, 13 Kan. 74. In Wilbur v. Hubbard, 35 Barb. 303, two dogs killed sheep of the value of $19. The dogs were of unequal size, and, the defendant's being the larger, a verdict for $12 against him was sustained on the ground that the jury had a right to say that the smaller dog did not do as much damage as the larger one. We must decline to follow the rule laid down by these cases. It is quite contrary to the terms and spirit of the statute. When these things are considered, it is but reasonable to hold that each owner of a dog engaged in doing the damage is liable for the whole amount of damage done. Any other holding would tend to emasculate the statute and deprive the sheep owner of the protection the statute was designed to give. Suppose two dogs, with different owners, together attack and frighten a traveler's horse, and damage ensues; under the rule sought to be invoked, the injured party could recover a fraction of his damages from one owner, to be measured according to the size of his dog, and the remainder from the other. This hardly accords with the true meaning and intent of the statute. The construction given the statute by the trial court, and here approved, finds support in the following cases: Kerr v. O'Connor, 63 Pa. St. 341; Worcester Co. v. Ashwood, 160 Mass. 186, 35 N. E. Rep. 773."

VIOLATION OF RESTRICTIONS IN DEEDS.

Many perplexing problems have arisen from stipulations and conditions in deeds to real property, in effect restricting the use and enjoyment thereof by the grantee. While the English cases on this subject are numerous, fairly harmonious, and in the main well considered, the American cases are rare and perhaps not so satisfactory. The general rules governing questions of this character are well understood. The seeming conflict of cases is more apparent in those involving questions of release and waiver, express or implied, of such restrictive covenants. When land is divided up by the owner into numerous lots and sold, and in the deeds thereof a condition or restriction is inserted which is shown either by its nature or the position of the property or words of the deed

or other evidence to be inserted for the benefit of the other lot owners, there is created a perpetual servitude upon the land in favor of the other lots, and such restrictions, if reasonable in their character, are upheld and enforced by courts of equity in favor of one of the grantees who may be the owner of one of the lots, against the owner of any of the lots who attempt to set the restrictions at naught.[1]

It is not necessary for equitable relief that this general plan should be expressed in the deeds. If from the situation of the land or from other attending circumstances it becomes clear that it was the intention of the parties to grant a negative easement in the land sold for the benefit of the other owners, it does not make any difference whatever that this purpose is not expressed in the deed. The question must be determined by the fair interpretation of the grant creating the easement, aided if necessary by the situation of the property and the surrounding circumstances. Indeed, in most of the cases where equitable relief has been granted, the purpose was not so expressed.[2]

Though, in order to sustain a proceeding in equity to restrain a violation of such a restriction, it must be shown that the defendant took the land with notice, either express or constructive, that the restriction existed, the owner of the land charged with such servitude is bound by the conditions in the deed of his remote grantor by which it was created, although it is not mentioned in the deed under which he immediately takes: that is, in the deed to him, and although he has no knowledge of it in fact, for as he derives his title under a deed which contains the condition he is bound to take notice of its provisions.[3]

Where the restriction is intended for the benefit of other lots which have been sold to various other vendees, the vendor cannot thereafter release the covenant because he cannot do anything in derogation of the rights of his subsequent vendee, any more than he could arbitrarily reclaim the whole property from his vendee. The right is in the nature of property. It has been purchased and paid for. It is vested. It is therefore under the protection of the law and cannot be divested by the mere act of the vendor.[4]

While it is undoubtedly true that courts of equity will sometimes, even in the absence of evidence of express release or waiver on the part of plaintiffs, refuse to enforce a condition or restriction limiting the use of property according to a general plan of improvement, such a case arises only where the condition or restriction has been actually violated by the owners of various lots in the scheme of improvement until the character of the adjoining property has become substantially and absolutely changed, this not so much upon the ground of acquiescence and estoppel as that there has been such a change in the character of the neighborhood as would render it inequitable to enforce the restriction.[5]

And the mere fact that there have been, to the knowledge of plaintiffs, other breaches of the covenant by other assigns of the original vendor, or even that plaintiff has broken them himself in unimportant and harmless particulars, will not debar him from the right to relief in equity against a substantial and harmful violation of it. The sole test is, has the character of the property, so far as the object and intent of the restriction is concerned, essentially and substantially changed? In other words, has there been a general abandonment of the restriction?[6] From the leading cases on the subject, it may be said that the sole question here is as to whether there

[1] Coughlin v. Barker, 40 Mo. App. 65; Washburn on Easements (4th Ed.), 185; Ladd v. City of Boston, 21 Am. St. Rep. 481, notes 484, 485; Hall v. Wesster, 7 Mo. App. 56.

[2] Mann v. Stephens, 15 Sim. 379; Patching v. Dubbins, Kay, 1; Peck v. Conway, 119 Mass. 546; Green v. Creighton, 7 R. I. 1; Barrow v. Richards, 8 Paige, 351; St. Andrew's Church App., 67 Pa. St. 512; Clark v. Martin, 49 Pa. St. 289; Tallmedge v. East River Bk., 26 N. Y. 105.

[3] Peck v. Conway, 119 Mass. 546; Whitney v. Union Ry. Co., 11 Gray, 359; Hall v. Wesster, 7 Mo. App. 56; Cornish v. Wiessman (N. J.), 35 Atl. Rep. 408; Leach v. Rains (Ind.), 48 N. E. Rep. 858.

[4] Western v. McDermott, L. R. 1 Eq. 499, 504; Child v. Douglas, Kay, 575.

[5] Amerman v. Deane, 132 N. Y. 355; Duke of Bedford v. Trustees, 2 Myl. & K. 552; Sayers v. Collyer, 24 Chan. Div. 180; Western v. McDermot, L. R. 1 Eq. 499, L. R. 2, Ch. 72; Trustees v. Thatcher, 87 N. Y. 311, 5 Amer. & Eng. Encyclopædia of Law, 16; High on Injunctions, sec. 22; Peeke v. Matthews, L. R. 3 Eq. 514, 517; Knight v. Simmonds, 2 Ch. (1896) 294.

[6] Western v. McDermott, L. R. 1 Eq. 499, L. R. 2 Ch. 72; German v. Chapman, 7 Ch. Div. 275; Patching v. Dubbins, Kay, 1; Payson v. Burnham, 141 Mass. 547; Jackson v. Stevenson, 156 Mass. 496; Richards v. Revitt, 7 Ch. Div. 224; Lardell v. Hamilton, 175 Pa. St. 327; Star Brewing Co. v. Primas, 163 Ill. 652; Reilly v. Otto (Mich.), 66 N. W. Rep. 228.

has been a substantial change in the character of the property. Acquiescence by a plaintiff in one, two or more breaches of the covenant counts for nothing, unless the breaches have been so numerous and so general that the character of the property has become changed. This is upon the theory of a general abandonment of the covenant or of an implication of an actual release by all the parties.[7] A mere passive acquiescence by a plaintiff in one or more breaches of the covenant cannot of itself be held a waiver precluding relief in the absence of a showing of a general alteration or substantial change in the character of the property. It is in effect a question of general abandonment rather than mere waiver of the restriction, and as a study of the cases reveal the doctrine is grounded, not so much upon the idea of an estoppel of plaintiff as that on account of a substantial change in the character of the property, the damage to plaintiff in withholding the injunction would be but nominal as compared to what the defendant would sustain if it was granted, and therefore it would be inequitable to grant it.[8] One of the oldest cases on this general subject is Duke of Bedford v. Trustees,[9] wherein, though an injunction was denied on the facts, the court lays down very clearly the rule of equity governing cases of this character, and justified refusal of an injunction only on the ground of a complete alteration and substantial change in the character of the adjoining property. In Patching v. Dubbins,[10] wherein a question of acquiescence in former breaches of the covenant incidentally arose, Vice Chancellor Wood, after citing with approval Duke of Bedford v. Trustees and adopting the doctrine of that case, which he thought did not apply to the facts of the case in hand, says, in effect, that acquiescence on the part of one grantee cannot be material where the covenant is for the benefit of all. He also says that "a much greater degree of acquiescence amounting in fact not only to positive license but to an implication of an actual grant, must exist before the parties can be forever deprived of their rights." The question of waiver by delay in instituting legal proceedings in that and many other cases is not applicable here, for there is no claim and no evidence to show any delay on the part of plaintiffs in pursuing their rights as against this defendant, or that the latter was led to expend money by reason of any acts or omissions of plaintiffs. In Sayles v. Collyer[11] the principles here contended for were applied where the evidence disclosed repeated and frequent breaches of the covenant to such an extent as that the character of the property had become changed from its original purpose, and the court applying this sole test as to change of plan held it would be inequitable to enforce the covenant, in view of the fact that "a majority of the buildings" on the block had been changed in character. To the same effect is Peeke v. Matthews.[12] In Western v. McDermott,[13] wherein injunction was decreed, it was held by Lord Romilly that a person who has acquiesced in breaches of a covenant of this character is not debarred of his remedy in equity, provided the breaches have not caused substantial injury. This is but another statement of the doctrine of Duke of Bedford v. Trustees. This case was affirmed on appeal before Lord Chancellor and Court of Appeal in chancery.[14] There Lord Chelmsford, L. C., says, by way of answer to the proposition that a plaintiff is precluded by any breaches of the covenant: "But assuming that the plaintiff and his predecessors have suffered these things to pass without notice when they sustained no particular injury, how can that deprive the plaintiff of his equity to use the covenant for his protection where the breach of it immediately affects the enjoyment of his house? It is not like the case of the Duke of Bedford where a covenant * * * was sought to be enforced by the plaintiff, in whom the adjoining lands were vested, after the whole of the property had been altered by his consent. The court, without expressing any opinion whether an action at law could be maintained, refused the injunction upon the ground that the party seeking to enforce the obligation which applied to the property in its former state had himself created the alteration out of which a new set of interests and rights had

[7] Hopkins v. Smith, 41 Atl. Rep. 1122.
[8] Amerman v. Deane, 132 N. Y. 355; Trustees of Columbia College v. Thatcher, 87 N. Y. 311.
[9] 2 Myl. & K. 552.
[10] Kay 10.
[11] 24 Chan. Div. 180.
[12] L. R. 3 Eq. 514, 517.
[13] L. R. 1 Eq. 498.
[14] Western v. McDermott, L. R. 2 Ch. 75.

arisen. I cannot, however, understand how a passive acquiescence in one breach of the covenant can be considered to be a waiver for all future time of the right to complain of any other breach."[15] A leading American case involving this question is Amerman v. Deane.[16] There the court laid down the doctrines of equity as we have stated them, though they refused to enforce by injunction a covenant against the erection of any tenement houses, inasmuch as the evidence showed that flats and tenement houses had already been erected upon the "greater portion" of the adjoining lots, thereby changing the character of the property and rendering it inequitable to enforce specific performance of the covenant. Roper v. Williams[17] was a case where a vendor took a covenant from all his purchasers, and after permitting many breaches and suffering the whole of his original design to be broken up sought injunction against one. Involved there was also delay and laches of plaintiff which caused defendant to expend money, etc. The case of Trustees v. Thatcher[18] is another case wherein, though the injunction was refused, the doctrine here invoked was recognized and applied. In that case it appeared that the character of the property had entirely and radically changed from a residence to a business district. In 5 American & English Encyclopædia of Law, page 16, it is said, that "the conduct of plaintiff such as acquiescence and laches may disentitle him to relief, but relief will not be refused merely because in a few instances the covenants have not been enforced," citing a number of cases. Payson v. Bunham,[19] is a case where injunction was awarded notwithstanding other breaches of the covenant "without express objection." In Jackson v. Stevenson,[20] the Massachusetts court deny the injunction on the ground of "a changed condition of the locality," but concedes that "an owner may neglect to object to some extent without losing his right to enforce the restrictions when they more clearly and seriously affect him," citing to this point Payson v. Bunham.[21]

[15] Knight v. Simmonds, 2 Ch. (1896) 294.
[16] 132 N. Y. 355.
[17] T. & R. 18.
[18] 87 N. Y. 311.
[19] 141 Mass. 547.
[20] 156 Mass. 496.
[21] *Supra*; Star Brewery Co. v. Primas, 163 Ill. 652.

The vital principle governing this question is clearly and concisely stated by Lord Justice James in German v. Chapman,[22] wherein the high court of chancery held that where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and there had been a breach thereof by reason of the opening of a school in one of the houses, this was not a waiver of the covenant as to another purchaser. We call attention especially to the language of Lord James in that case on pages 278 and 279, wherein he vigorously criticises the contention that plaintiffs may be precluded from equitable relief in view of evidence of other breaches of the covenant, not however of such character as to constitute a change or alteration in the plan of improvement. And in Richards v. Revitt[23] the same court held that a plaintiff is not precluded from obtaining an injunction because he has not attempted to prevent previous unimportant breaches of the covenant. In a recent Pennsylvania case it was even held that where a building restriction is still of substantial value, notwithstanding the changed use of the land and buildings, equity will restrain its violation if promptly sought.[24] The test sometimes applied by courts of equity in cases of this nature, as to the comparative damage to plaintiff and defendant by withholding or awarding injunction, is in reality but an application of the doctrine of abandonment of a restriction as evidenced by a change in the character of the property. If, in fact, the breaches of the covenant have been so numerous and of such character that the property is entirely changed from its original plan, the advantage to plaintiff in nominally upholding the covenant would be but slight, and the damage to him in denying injunction inconsiderable, compared with that which defendant might sustain if it were granted.[25]

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[22] 7 Ch. Div. 278.
[23] 7 Ch. Div. 224.
[24] Landell v. Hamilton, 175 Pa. St. 327.
[25] Cornish v. Wiessman, 35 Atl. Rep. 408.

CORPORATIONS — BY-LAWS — MEETINGS OF DIRECTORS—NOTICE—VALIDITY OF ACTS —STOCK ASSESSMENTS—COLLECTION BY SUIT—APPEAL AND ERROR.

BANK OF NATIONAL CITY v. JOHNSTON.

Supreme Court of California, March 24, 1900.

1. Where in the absence of by-laws fixing the times for meetings of directors of a corporation, all of the directors, being duly assembled, agree to adjourn to a date and hour named, a meeting held by a majority of the directors at the time thus fixed is a legal meeting of the board, though no personal notice of the meeting is given to each director; and the acts of such meeting will be valid, under Civ. Code, § 308, providing that every decision of a majority of the directors, made when duly assembled, is valid as a corporate act.

2. In the absence of any limitation imposed by statute or the articles of incorporation or by laws of a corporation requiring the object of a special meeting to be stated in the notice therefor, a board of directors duly assembled at an adjourned meeting, may resolve to proceed by action for the collection of an assessment upon stock, as provided in Civ. Code, § 349, where the resolution levying the assessment fixed a day when unpaid assessments would become delinquent, and the time for payment has expired.

HARRISON, J.: The plaintiff seeks by this action to recover the amount of an assessment upon certain shares of its capital stock held by the defendant. The resolution levying the assessment was adopted September 8, 1896, and it fixed October 30th as the day on which unpaid assessments should be delinquent, and November 25th as the day for the sale of delinquent stock. The only issue presented by the answer is upon the allegation in the complaint that the plaintiff elected, by virtue of section 349, Civ. Code, to proceed to recover the assessment by action. Judgment was rendered in favor of the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

It was shown at the trial that at a meeting of the stockholders in 1888 certain by-laws were unanimously adopted, and that the minutes of this meeting containing said by-laws were copied into a book labeled on its back, "Record—The Bank of National City," and kept in the office of the corporation, but that the by-laws were not otherwise certified to by any officer, or copied into any other book; that said book has since that date been used for the record of the permanent minutes of the meetings of the stockholders and of the board of directors of the corporation; and that the record of said by-laws in said minutes has always been regarded by the stockholders and officers of the bank as the only book of by-laws thereof. One of these by-laws provides, "A stated meeting of the board of directors shall be held on the second Tuesday of each month at the bank, at such hour as may be designated by the president." In May, 1888, the board of directors adopted a resolution that its regular monthly meeting should be held on the second Tuesday of each month, at 10 o'clock a. m.; and since that time all the meetings of the board have been by usage and custom convened at that hour unless a different hour for any particular meeting was specially appointed. The minutes of the board of directors of October 13th, which was the second Tuesday of that month, recited that a regular meeting was held that day, at which five directors were present, and that after transacting certain business the meeting adjourned for one week. The minutes also show that on October 20th an adjourned meeting of the board of directors was held, at which all of the directors were present, and that at the close of its business it adjourned for one week; that on October 27th, an adjourned meeting of the board was held, at which all of the directors were present; and that at its close it "adjourned to next Saturday, October 31st, at nine o'clock a. m." The minutes of October 31st recite: "At an adjourned meeting of the board of directors of the Bank of National City held this day there were present" (naming five directors). At this meeting there was adopted, by the unanimous vote of all the directors present, a resolution electing to proceed by action to recover the delinquent assessments, one of which was upon the stock of the defendant. No order was signed or given by the president or secretary calling either of these meetings, nor was there any special notice thereof in writing, or any written notice given to any of the directors, other than such as appears upon the face of the minutes.

It is contended by the respondent that under the provision of section 304, Civ. Code, and because of the failure of the plaintiff to have the by-laws adopted by the stockholders certified and copied as required by that section, none of said by-laws ever took effect or had any validity; that as there is no by-law which makes provision for regular meetings of the directors, or the mode of calling special meetings, under section 320, *Id.*, all meetings must have been called by special notice in writing given to each director by the secretary on the order of the president; that, as such notice was not given, the board of directors at which the resolution to collect the assessment by action was adopted was not "duly assembled," and the resolution itself has no validity. It may be conceded that by reason of the provision in section 304, Civ. Code, the by-laws adopted in 1888 did not take effect, but it does not follow that the directors of the corporation were thereby precluded from themselves determining the days upon which they would hold regular meetings. By section 305, *Id.*, the corporate powers of all corporations are to be exercised by the board of directors, who, under section 308, are to organize immediately after their election, and are required to perform the duties enjoined on them by law. The same section declares, "A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision

of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." The provision of section 320, *Id.*, for calling meetings "when no provision is made in the by-laws for regular meetings of the directors, and the mode of calling special meetings," implies that the stockholders may omit to adopt by-laws upon these subjects, and that the directors may themselves fix the time at which their regular meetings shall be held. In the absence of any statute on the subject, it would be requisite to give to each director a notice of the time at which any special meeting should be held. The statute declares who shall have the authority to give such notice, but this provision does not prevent the entire body of directors from holding a meeting in accordance with their previous agreement. If all are present under such agreement, the board will be "duly assembled" and their exercise of the corporate powers will be valid. Mr. Thompson, in his treatise on Corporations, says (volume 7, § 8486): "The general rule that all the directors of a corporation are entitled to notice of any meeting at which any corporate business is to be transacted 'yields to the principle that the failure to give notice is waived or rendered of no importance—in whatever way it is regarded—where, notwithstanding the want of notice, all the directors meet and consult and participate in the business of the meeting,' and to the further principle 'that where a meeting is regularly assembled but adjourns to a future time and place, special notice of the adjourned meeting is not necessary, since the fact and record of the adjournment give such notice.'" Whether the meeting of October 13th is to be regarded as a stated meeting or not, or whether the meetings of October 20th and October 27th are to be regarded as adjournments of that meeting, or as special meetings, is immaterial in the present case. At each of the two last meetings all the directors were present, and the meetings fall within the principles stated above by Mr. Thompson. The adjournment by all of the directors from October 27th to October 31st was an agreement between them to meet on that day, and dispensed with the requirement for any further notice. In Whitehead v. Rubber Co., 52 N. J. Eq. 84, 27 Atl. Rep. 897, the vice chancellor said upon the same question: "If all the directors had been present at any meeting, and had agreed to an adjournment for the purpose of considering the question now before us, the result of their deliberations would have been sustained." In Minneapolis Times Co. v. Nimocks, 53 Minn. 381, 55 N. W. Rep. 546, the court said in reference to this proposition: "If it was the fact that the special meeting of the directors which made the assessment was not called upon notice, as provided in the by-laws, it is wholly immaterial, for the reason that all the directors were personally present and participated in making the assessment. The only object of notice is that the directors have an opportunity of being present at the meeting, and taking part in its proceedings."

The board of directors was therefore "duly assembled" at its meeting on October 31st, and as a majority of the board were then present, and adopted the resolution to proceed by action for the collection of the delinquent assessments, such resolution was, under section 308, Civ. Code, "valid as a corporate act." The board was not limited at that meeting to the consideration of matters which had been left unfinished at the former meeting, or to matters which by reason of extrinsic conditions could not then have been considered. There is no requirement in any by-law of the corporation, or in the statute, which imposes any limitation upon the business to be transacted at a special meeting, or which requires the object of a special meeting to be stated in the notice therefor, and in the absence of such requirement the notice need not state the object. Granger v. Mining Co., 59 Cal. 678; *In re* Argus Co., 138 N. Y. 578, 34 N. E. Rep. 388. Whatever corporate action upon any subject could be taken on that day was within the consideration and decision of the board, and its action thereon was effective as a corporate act. By the original resolution in levying the assessment, October 30th had been fixed as the day on which the unpaid assessment would be delinquent, and under section 349, Civ. Code, the board was authorized "at any time subsequent thereto" to elect to proceed by action. It is not disputed that a meeting could have been called by express notice for that day for the purpose of adopting such resolution, but, as the meeting which was held on that day was as fully authorized as if it had been called by such notice, its acts and resolutions are entitled to the same consideration. The board of directors which holds a special meeting, called for the purpose of transacting certain specified business, may not be authorized to transact any other business at an adjourned meeting thereof; but, if there is no limitation upon the business which the board is authorized to transact at the special meeting, it may transact any business at an adjournment of that meeting, whether it was partly considered at the original meeting, or whether the opportunity or occasion for its consideration has arisen since the adjournment. "If it was a legal meeting, they had the right to pass any resolution and take any action which did not violate the law of their organization, or exceed the powers with which, as a corporate body, they were invested." Smith v. Law, 21 N. Y. 296. See, also, Western Imp. Co. v. Des Moines Nat. Bank, 103 Iowa, 455, 72 N. W. Rep. 657.

The defendant filed a demurrer to the complain t which was overruuled, and he thereupon answered the complaint; and, upon the trial of the issues thus raised, judgment was rendered in his favor. It is now urged by him that the judgment should be affirmed upon the ground that his demurrer should have been sustained. As he did not, however, appeal from the action of the court in overruling his demurrer, that action is not here for review. The cause was tried upon the theory

that the plaintiff's right of recovery depended upon the validity of its resolution to proceed by action, and, aside from this resolution, the sufficiency of the complaint was not made the basis of the judgment, nor did it enter into the issues before the court. If the court had sustained his demurrer, the plaintiff might, under its order, have amended its complaint so as to obviate the objection thereto, whereas, if we should now affirm the judgment upon the ground that the demurrer should have been sustained, the plaintiff would be remediless. The judgment and order are reversed.

NOTE.—*Recent Cases Involving the Validity of Acts of Board of Directors of Corporations, the Legality of Meetings, and of By-laws Governing Same.* —Under St. ch. 32, sec. 20, providing that where all the directors of a corporation are present at any meeting, it shall be a valid meeting, however called, a meeting had without notice is valid, though one of the directors withdraws on being removed from the office of secretary of the corporation. Stobo v. Davis Provision Co., 54 Ill. App. 440. The proceedings of a directors' meeting will not be set aside, for want of a quorum, where there were a sufficient number present to constitute a quorum, but one of them refused to vote. Mercantile Library Hall Co. v. Pittsburgh Library Assn. (Pa. Com. Pl.), 25 Pittsb. Leg. J. (N. S.) 345. Where notice of a directors' meeting was sent to each of the directors, the fact that one of them was away from home, and did not receive the notice, does not affect the validity of the meeting. Mercantile Library Hall Co. v. Pittsburgh Library Assn. (Pa. Com. Pl.), 25 Pittsb. Leg. J. (N. S.) 345. Where it appears that a majority of the directors in a corporation met at an unusual time and place for holding meetings, and no record of the meeting is produced or alleged to exist, one attempting to show that the corporation, by such meeting, had ratified the act of its agent, must prove that such directors had actual notice of the meeting. First Nat. Bank v. Asheville Furniture & Lumber Co. (N. C.), 21 S. E. Rep. 948. The unauthorized act of the secretary of a corporation cannot be ratified at a special meeting of which all the directors were not notified. Pauly v. Pauly (Cal.), 40 Pac. Rep. 29. The acts of the majority of directors at a meeting held at an unusual time and place, without notice to the other directors, are not binding on the corporation. First Nat. Bank v. Asheville Furniture & Lumber Co. (N. C.), 21 S. E. Rep. 948. Where the by-laws of a corporation provide that meetings of directors shall be specially called, a meeting held by a majority of the directors without such call is invalid. P. P. Mast Buggy Co. v. Litchfield Furniture, Hardware & Implement Co., 55 Ill. App. 98. Rev. St. Mo. 1889, sec. 5210, providing that a majority of the governing body of a corporation shall be sufficient to form a board for the transaction of business, and making valid every decision of a majority of such board, does not render valid an act merely because sanctioned by members of the board, unless that sanction is expressed when they are duly assembled. Kansas City Hay Press Co. v. Devol (U. S. C. C.), 72 Fed. Rep. 717. The secretary of a corporation, on the order of the president, sent by mail to each of the seven directors a written notice of a special meeting, properly addressed and postpaid, three days before the time fixed for the meeting. Held, that notice was given as required by Civ. Code, sec. 320, and the acts of the five directors present were valid. Stockton Combined Harvester & Agricultural Works v. Houser, 109 Cal. 1, 41 Pac. Rep. 809. Notice to the directors of a corporation of a special meeting will be presumed, in the absence of proof to the contrary, though not recited in the accord of the meeting. Stockton Combined Harvester & Agricultural Works v. Houser, 109 Cal. 1, 41 Pac. Rep. 809. A resolution fixing the salary of a director as officer of the corporation is not invalid merely because such officer was presest at the meeting of the board, and voted for the resolution, where his vote was not necessary to carry the resolution, and there was no evidence that the amount fixed exceeded the reasonable value of the services rendered by him. Keans v. New York & College Point Ferry Co. (City Ct. N. Y.), 40 N. Y. S. 366, 17 Misc. Rep. 272. In the absence of any by-laws or fixed practice in that regard, a notice of a meeting of the board of managers is insufficient, if not received by the members of the board before the morning of the day on which the meeting is to be. Mercantile Library Hall Co. v. Pittsburgh Library Assn., 173 Pa. St. 30, 37 W. N. C. 533, 33 Atl. Rep. 744. A notice of a special meeting of the board of managers, stating that it was to hear the treasurer's report, and transact any other business which might come before the board, successors to the members of which were about to be elected, was insufficient, when the business actually transacted at the meeting included a perpetual lease, which involved the practical surrender of the active duties of the corporate trust. Mercantile Library Hall Co. v. Pittsburgh Library Assn., 173 Pa. St. 30, 37 W. N. C. 533, 33 Atl. Rep. 744. Where the number of directors to constitute a quorum is fixed by resolution, a purchaser for value, and without notice of irregularity, acquires a good title, though the number of directors who authorized the contract to be made or the corporate seal to be affixed was less than the number prescribed by the resolution. County of Gloucester Bank v. Rudry Merthyr Colliery Co., 1 Ch. 629, 12 Reports, 183. To pay or to secure the payment of an account contracted in the ordinary business of a corporation is not an extraordinary proceeding, of which notice must be given in a call, as a condition precedent to action by the directors. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N. E. Rep. 410. A finding that the board of directors of a railroad company had adopted, by a two-thirds vote of their whole number, a resolution to change the line of the road, is supported by the record of the meeting at which the resolution was presented, showing that a quorum was present, and stating that the resolution, which could be carried only by a two thirds vote, was carried; and the testimony of a director that, to his knowledge, all the nine directors (an admitted two-thirds) present at the meeting voted for the resolution, except that he did not hear the chairman so vote; and that the chairman declared the resolution carried, and certified to the map showing the change. Fletcher v. Chicago, St. P., M. & O. Ry. Co. (Minn.), 69 N. W. Rep. 1085. Under Rev. St. ch. 32, sec. 20, declaring that the action of the directors of a corporation at a meeting held outside of the State shall be void, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the officers at a regular meeting, a mortgage executed in pursuance of a resolution adopted at a meeting held in another State was invalid as against attaching creditors, where such meeting was not authorized nor such action ratified by a vote of two-thirds of the directors. State Nat. Bank v. Union Nat. Bank, 168 Ill. 519, 48 N. E. Rep. 82. Directors of a corporation, as such, can only act as a board, unless

there be an express or implied delegation of authority to act individually. Morrison v. Wilder Gas Co. (Me.), 40 Atl. Rep. 542. A person who has been elected a director of a corporation, but has not yet, either expressly or by implication, accepted, is not entitled to notice of special meeting. United Growers Co. v. Eisner, 47 N. Y. S. 906, 22 App. Div. 1. Legal special meetings may be held by the directors of a corporation, although the by-laws are silent on the subject. United Growers Co. v. Eisner, 47 N. Y. S. 906, 22 App. Div. 1. Since Act April 29, 1874, provides that a majority of the whole number of directors shall be necessary to constitute a quorum, a contract entered into in pursuance of a meeting of directors, half of whom, only, were present, is not binding on the corporation. Curry v. Claysville Cemetery Assn., 5 Pa. Super. Ct. 289, 28 Pitts. Leg. J. (N. S.) 81, 40 W. N. C. 536. A meeting of the directors of a mining corporation, having no by-law for calling meetings, held at the office of its president, called by him on verbal notice, at which all the members were present except one, who could not have voted, because directly interested in the only business transacted, is legal, under Comp. Laws, sec. 2932, subd. 4, providing that, "when no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president," and the acts of the directors at such meeting are binding. Troy Min. Co. v. White (S. Dak.), 74 N. W. Rep. 236. Where meetings of a board of directors have been held and business transacted within the scope of the purposes for which the corporation was organized, the presumption is that such meetings were regularly called and held, and the burden is upon one maintaining the contrary. Singer v. Salt Lake City Copper Mfg. Co. (Utah), 53 Pac. Rep. 1024. Where a meeting of a quorum of directors is convened without notice to the absent members, and there is no especial emergency, the acts done at such meeting are void. Singer v. Salt Lake City Copper Mfg. Co. (Utah), 53 Pac. Rep. 1024. Where, immediately after a meeting of the board of directors, one of the directors, who was a creditor of the corporation, left the city, and within a few days, and without any attempt to notify such director, and after the membership of the board had been changed, a special meeting of part of the board was called, and steps were attempted to be taken which would affect the absent director's interests, the meeting and proceedings were void, as being a fraud on said director. Singer v. Salt Lake City Copper Mfg. Co. (Utah), 53 Pac. Rep. 1024. The directors of a corporation cannot separately and individually give consent to or make a contract to bind the corporation. Limer v. Traders' Co. (W. Va.), 28 S. E. Rep. 730. A corporation claiming that all of its directors were not notified to attend a meeting has the burden of proof. Barrell v. Lake View Land Co. (Cal.), 54 Pac. Rep. 594. Where it is not shown whether a meeting of the board of directors of a corporation was regular or special, there is no presumption that it was special. Barrell v. Lake View Land Co. (Cal.), 54 Pac. Rep. 594. That the board of directors of a corporation made no record of their action does not affect the validity of a sale of personal property duly authorized by them. Oakford & Fahnestock v. Fischer, 75 Ill. App. 544. Proceedings at a special meeting held by a bare majority of the board of directors, without notice to the other members, are void, although none of those present voted in favor of the action taken, and the result would have been the same had the other members been present. Vaught v. Ohio County Fair Co. (Ky.), 49 S. W. Rep. 426.

JETSAM AND FLOTSAM.

DEATH OF BRAKEMAN BY BEING KNOCKED DOWN BY OVERHEAD BRIDGE.

The construction of overhead railroad bridges so low that a brakeman on the top of a freight train, in the discharge of his duties, is liable to come in contact with them, to his death, has resulted in killing a great many railway men, and the list grows day by day. It grows with the assistance of such decisions as the one which we are about to chronicle. In the case of Myers v. Chicago, etc. R. Co., 95 Fed. Rep. 406, decided by the Circuit Court of Appeals for the Eighth Circuit, by Thayer and Sanborn, JJ. (Caldwell, J., dissenting), it was held, according to the syllabus, which seems not incorrect though condensed, that a railroad company cannot be held guilty of negligence which renders it liable for the death of a brakeman who was knocked from the top of a freight train while passing under a bridge on a city street, which was built by the company at the height required by the municipal authorities for public convenience, and where it had verbally warned the deceased of the danger of standing upright while passing the bridge, and also placed whip lashes, or "tell tales," at proper distances each side for the same purpose. It does not appear from the opinion that the railroad company could not have procured from the city authority to build the bridge a little higher, if they had sought such authority. Another question was whether if bridges of the same nature over the same track had been built a little higher, "they would have impaired the use of the streets to some extent by making the approach to the bridge inconveniently steep," and whether "for that reason the several bridges were built at the height last indicated." And there was the usual statement which appears in such cases, that the deceased knew about the existence and height of the bridges, and that the company had warned him of the danger and had erected so-called "tell tales," consisting of whip lashes intended to touch the face of the brakeman and warn him that he is approaching the bridge. Experience shows that the most careful railroad men, absorbed in the performance of their duties, are killed in this way, notwithstanding the "tell tales" or whip-lashes. In fact, such bridges are murder machines, and the erection of them is cruel and wicked. The railway managers who are responsible for them ought to be indicted and punished for manslaughter whenever a brakeman is killed in this way; and if the bridge has been erected with the permission, license or concurrence of the authorities of the city, it ought clearly to be shown, in order to exonerate such directors, that they used their best endeavors to procure a license to erect it higher and failed in doing so,—in which case the responsibility ought to be shifted upon the authorities of the city. No question of public convenience ought to authorize or condone murder; nothing but an overruling necessity, an absolute *vis major*, should afford a justification for the erection of a highway bridge across a railway so low that a brakeman is liable to be knocked down by it and killed, when engaged in the discharge of his duty, standing up on the top of a car.

"No, place, indeed, should murder sanctuarize;" and a court of justice is the last place where this should be done. The dissenting opinion of that able and humane judge, Caldwell, is much to be preferred in this case. We notice that, in his opinion, Judge Thayer inadvertently cites De Witt v. Railroad Company, 50 Mo. 302. That case has been overruled by a case decided most recently, and it is no longer the law in Missouri. Judge Caldwell truly says: Dangers which needlessly imperil human life, and which can be remedied at little cost, are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the railroad to remove. The necessities of laboring men are often very great. The necessity of providing food for themselves and families may drive them to accept employment at the peril of their lives. But an employer does not obtain a license to kill his employees with impunity by proclaiming his purpose to subject them to unnecessary and needless perils,—to perils that a reasonably prudent man, having a due regard for human life, would remove. Common humanity demands this. Moreover, the State has an interest in the lives of her citizens, and will not permit an employer needlessly to imperil the lives of his employees. The very highest consideration of public policy demands an enforcement of this rule. And the peril is unnecessary and needless where, as in this case, it can be removed at slight expense. Notice of the unnecessary peril in such case goes for nothing. As long as the needless peril is maintained, the employer is guilty of culpable negligence; and when, by reason of such needless peril, an employee is killed, the law presumes he was exercising due care to escape the peril, and the employer is responsible for his death, unless he can prove affirmatively that the employee was guilty of negligence. In such cases the death of the employee testifies that he was in the faithful discharge of his duties and in the exercise of due care, and that his death is the result of the needless peril to which he was subjected.—*American Law Review.*

CORRESPONDENCE.

To the Editor of the Central Law Journal:

I would answer Mr. Young's inquiry in your last journal, page 333, by saying that under the statutes of limitation of Oklahoma (sec. 3893), the five years' limitation never began to run. Therefore, Roberts may be sued any where. Hardware Mfg. Co. v. Lang, 127 Mo. 244; East Tenn. Ry. v. Kennedy, 83 Ala. 462; Wyman v. Halstead, 109 U. S. 656; Owen v. Miller, 10 Ohio St. 136, 75 Am. Dec. 507. Can any of your readers give authorities on the legal *status* of "department stores?" Example: Alpha rents a building and puts in a "department" of boots; B rents space for a silk department from Alpha for which he pays 10 per cent. of his sales as rent; C rents space from Alpha for which he pays 10 per cent. of his sales, and puts in a "department" of dress goods; and so on down through the alphabet. Alpha furnishes all the "floor walkers," heat, light, pays the clerks, does the advertising, etc.; also, he receives and banks all the proceeds of sales and keeps the accounts. "Alpha's department store" is the only sign. Supposing Alpha has $10,000 in a bank which fails and pays 50 per cent. on non-preferred claims, and then Alpha fails and can pay only 10 per cent. on the dollar of his debt; how much money will B get, who contributed from his department $2,000, as proceeds of sales, which was a part of the $10,000 that Alpha had in the bank? Is such a "department" store a partnership?

C. M. SCANLAN.

RIGHTS OF PURCHASERS OF OVERDUE NOTE.

To the Editor of the Central Law Journal:

I notice in the issue of your Journal, dated May 4th, you adopt, on pages 352 and 353, the review of the case of Y. M. C. A. Gymnasium Co. v. Rockford National Bank, 179 Ill. 599, made by "Case and Comment." Although other attorneys appear in the case, I was the fortunate one who presented, tried and argued this case for the Rockford National Bank in the appellate and supreme court of our State, and inasmuch as it seems to be regarded as an important case, I do not like to have our supreme court made ridiculous by an error which has crept into the reviews. The first commentator to make the mistake was the one who prepared the report in the 46th volume of the L. R. A., and that mistake seems to have been carried on through journals which have copied the case. In speaking of the test laid down by Story, it is stated in the note in your journal that this test is quoted with approval in the Illinois case, but that it is inconsistent with the position taken by our court because the notes or paper in question were given merely as accommodation paper, which, of course, the payee could not enforce against the maker. How such statements could be made after even a cursory examination of the case itself is strange. The paper was not accommodation, and whatever error our court might have made, it was not in that respect inconsistent. In our case there were six two hundred-dollar notes in question. The facts under which they were given are as follows: The Y. M. C. A. Gymnasium Company was an incorporation organized under our general law for pecuniary profit. The makers of the six notes were subscribers to its stock. These notes were given as part payment of their stock subscriptions to the Y. M. C. A. Gymnasium Co. They were valid obligations in the hands of the payee as against the makers, and were not in any sense given for accommodation. There is nothing in the opinions, either in the appellate or supreme court, on this case that would warrant the assertion that the notes were accommodation paper. The only reason for this communication is the fact of being interested in the case, and vitally interested in the ability of our supreme court, I hate to see the court placed in an inconsistent position when the facts do not justify it.

Rockford, Ill. R. K. WELSH.

BOOK REVIEWS.

EXPERT AND OPINION EVIDENCE, Reduced to Rules, With Illustrations From Adjudged Cases, Second Edition.

Professor Lawson in his revision of this valuable treatise on Expert and Opinion Evidence, has not lessened his good reputation as a careful and painstaking author. He published the first edition of this treatise in 1883, in which edition about 1,800 cases were cited. In the present edition there are cited 3,000 cases. A special feature of the present edition is the table of cases, wherein the rules laid down in the first edition have been approved or cited by courts of last resort.

The value of this feature is that while the rule when first published was simply the opinion of the author, it has now the official and weighty endorsement of one or more of our appellate courts. The author has not followed the beaten track of most law writers by simply citing all decisions on the subject under treatment. He has done more. He has out of the multitude of varying decision, formulated conclusions, as all authors should do, thereby assisting the practitioner, when called upon for an opinion on any given subject, to more easily arrive at a conclusion as to the interpretation to be derived from the varying decisions. Who can better render this assistance than an author of Professor Lawson's long experience. The fashion of many authors of simply making a digest and calling it a text book renders but little aid to the busy lawyer, but when the author formulates his treatise into rules, giving the reasons for such rules, together with the arguments for and against the conclusions reached, then the reader has received substantial assistance, and can himself understand from the author's logical reasoning why certain results have been reached. Such a treatise assists the investigator to form correct conclusions. The author has rendered a great service in thus reducing the law of expert and opinion evidence to rules in the same manner as he prepared his treatise on Presumptive Evidence, of which also a second edition was recently issued. Expert and opinion evidence is an every day subject in the courts as proven by the great number of cases involving the admissibility of such testimony which have come before the court since the publication of the first edition of this book. John D. Lawson, now Professor of Contract and International Law in the University of the State of Missouri, was the second editor of the CENTRAL LAW JOURNAL, succeeding in that calling the Hon. John F. Dillon, and our JOURNAL is proud to acknowledge that much of its prosperity is due to Professor Lawson's good legal judgment in determining the class of legal journal the profession required and the plans by him mapped out have since been steadily pursued. The book contains 740 pages, mechanically a remarkably well prepared book. Published by T. H. Flood & Company, Chicago.

BOOKS RECEIVED.

Ames on Forgery, its Detection and Illustration. With Numerous Causes Celebres (illustrated). By Daniel T. Ames. San Francisco, Daniel T. Ames, 24 Post Street. New York, Ames-Rollinson Company, 1900. Sheep, pp. 293. Price $3.00. Review will follow.

1899 Annual. Hamilton's New York Negligence Cases, Classified. A Complete Collection of all Reported Negligence Cases Decided by all the New York State Courts, from Jan. 1, 1899, to Jan. 1, 1900. Classified According to the Facts. Prepared and Edited by T. F. Hamilton, of the New York Bar. Albany, N. Y., Matthew Bender, 1900. Paper, 179 pp., Price $1.50.

The Organization and Management of a Business Corporation with Special Reference to the Laws of of New York, New Jersey, Delaware and West Virginia. Containing Complete Forms for By-laws, Comparison of Corporations and Co-partnerships, and Provisions for the Protection of Minority Interests. By Thomas Conyngton of the New York Bar. Lawyers' Co operative Publishing Company, 1900. Canvas, pp. 203, Price $1.50.

The Law of Expert and Opinion Evidence, Reduced to Rules, with Illustrations from Adjudged Cases. By John D. Lawson, LL.D., Professor of Contract and International Law in the University of the State of Missouri, and Author of a Similar Work on the Law of "Presumptive Evidence." Second Edition, Revised and Enlarged. Chicago: T. H. Flood & Company, 1900. Sheep, pp. 732. Price $6.25.

HUMORS OF THE LAW.

"I hear O'Flanaghan is going to prove an alibi at his trial."

"What's an alibi, Pat?"

"Shure, and it's being in two places at once."

"I'd like to marry a lawyer."

"What for, Arabella?"

"He wouldn't be always arguing with me."

"How do you know?"

"Lawyers never argue without a fee in sight."

A Springfield lawyer has a son about 10 years old and a daughter about twice that age. The boy has been around the courthouse a good deal with his father, and the young lady has a steady beau. The other evening the young gentleman passed the house, and the young lady desired to speak to him.

"Bobby," she said to her little brother; "won't you please call to Mr. Brown?"

Bobby knew the state of affairs, and he hurried to the front door and called out in the usual loud monotone of a court bailiff:

"John Henry Brown, John Henry Brown, John Henry Brown, come into court."

Mr. Brown came in, and Bobby withdrew to a safe place.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTIONS—Waiver of Tort.—Where a trespasser has quarreled and removed stone belonging to plaintiff, the latter can waive the tort, and sue in *assumpsit*, especially where the trespasser has not only actually applied the stone to his own beneficial use, but has so used the stone that it cannot be reclaimed.—PHELPS v. CHURCH OF OUR LADY HELP OF CHRISTIANS, U. S. C. C. of App., Third Circuit, 99 Fed. Rep. 683.

2. ADMINISTRATORS — Personal Liabilities.—An acceptance by an intestate's debtor of an appointment as his administrator discharges the debt, and requires him to account for the amount of the debt as so much money received in his fiduciary capacity.—ARNOLD v. ARNOLD, Ala., 27 South. Rep. 465.

3. ADVERSE POSSESSION — Limitations.—A lot was sold under execution in 1867, but the owner continued to reside on it until his death in 1870, and his widow lived and paid the taxes thereon until her death, in 1887. Their children, in defense to an ejectment suit by the holder of the legal title, claimed the property by virtue of adverse possession for the statutory period of 10 years. Held, that the claim was not good, since the father did not hold the lot long enough to gain title by adverse possession, and the possession of the mother, being under the right of quarantine, was neither a continuation of the father's possession nor adverse to the holder of the legal title.—ROBINSON v. ALLISON, Ala., 27 South. Rep. 461.

4. ALTERATION OF INSTRUMENTS—Mortgage—Burden of Proof.—Where a party in giving a mortgage used printed notes and mortgages, which he was accustomed to use in making loans to others, and made necessary and self-explanatory alterations therein, the burden of proving that they were made after the execution of the mortgage rests on the party attacking the mortgage.—HART v. SHARPTON, Ala., 27 South. Rep. 450.

5. ATTACHMENT—Assignment—Bankruptcy.—Rev. St. Wis. § 1694a, providing that if an insolvent debtor makes a voluntary assignment within 10 days after his property has been attached or levied on, or garnishment issued against him, in favor of any creditor, such attachments, levies, garnishments, or other process shall be dissolved, and the property turned over to the assignee or receiver, was not superseded by the federal bankruptcy law of 1898, and, so long as bankruptcy proceedings have not been actually instituted involving the debtor, an attachment issued five days before his general assignment may be dissolved under its provisions.—BINDER v. MCDONALD, Wis., 82 N. W. Rep. 156.

6. BANKRUPTCY—Acts of Bankruptcy—Preferences.—Where an insolvent debtor conveys all his property to a trustee, with directions to convert the same into money, and to apply the proceeds—First, to the payment of the costs and expenses; second, to the payment of such of the grantor's creditors as are entitled to priority under the laws of the State; third, to the payment of the grantor's general creditors according to a schedule set forth in the deed; and, finally, to return to the grantor any balance that may remain,—such conveyance is not a transfer of property with intent to prefer a creditor or creditors, within the meaning of Bankr. Act 1898, § 3a, cl. 2, and therefore is not, on that ground, an act of bankruptcy.—RUMSEY & SIKEMIER CO. v. NOVELTY & MACH. MFG. CO., U. S. D. C., E. D. (Mo.), 99 Fed. Rep. 699.

7. BANKRUPTCY—Application for Discharge—Authority of Referee.—Where a bankrupt's application for discharge, with specifications in opposition thereto by creditors, is referred to a referee in bankruptcy, the authority of the latter is not limited to the taking and reporting of the evidence adduced on the hearing and ruling as to its admissibility, but he should also report findings and recommendations.—IN RE KAISER, U. S. D. C., D. (Minn.), 99 Fed. Rep. 689.

8. BANKRUPTCY—Election of Trustee—Vote of Secured Creditor.—In the election of a trustee in bankruptcy, a secured creditor may surrender his security, and vote as on an unsecured claim; but, failing this, he will not be entitled to vote unless his claim exceeds the value of the security which he holds, and then only for such excess as shall be allowed by the court.—IN RE EAGLES, U. S. D. C., E. D. (N. Car.), 99 Fed. Rep. 695.

9. BANKRUPTCY—Opposition to Discharge.—Creditors opposing a bankrupt's application for discharge, on the ground of his having concealed property from his trustee, must sustain the burden of proving, to the satisfaction of the court, that such concealment was fraudulent on the part of the bankrupt, and with his knowledge, and a discharge will not be refused on evidence which leaves in doubt the existence of a fraudulent intent.—IN RE WETMORE, U. S. D. C., E. D. (Penn.), 99 Fed. Rep. 708.

10. BANKRUPTCY — Priority of Claims — Wages of Labor.—A traveling salesman is not a workman, nor a clerk or servant of his employer, within the meaning of Bankr. Act 1898, § 64b, cl. 4, according priority of payment out of bankrupts' estates to "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant."—IN RE GREENEWALD, U. S. D. C., E. D. (Penn.), 99 Fed. Rep. 705.

11. BANKRUPTCY — Proof of Debt — Amendment.—A court of bankruptcy has discretionary power to allow a proof of debt against the bankrupt's estate to be amended, and will generally grant leave to amend, in cases of mistake or ignorance of law or fact, in the absence of fraud, when justice seems to require that the amendment should be made, and when all parties can be placed in the same situation they would have occupied if the error had not occurred.—IN RE MYERS, U. S. D. C., D. (Ind.), 99 Fed. Rep. 691.

12. BANKS—Deposits.—The general rule prevails in courts of equity that equality is equity.—PERTH AMBOY GASLIGHT CO. v. MIDDLESEX CO. BANK, N. J., 45 Atl. Rep. 704.

13. BANKS AND BANKING—Collection.—A bank which undertakes to collect a draft is bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment.—OMAHA NAT. BANK v. KIPER, Neb., 82 N. W. Rep. 102.

14. BILLS AND NOTES—Action.—It is no defense to an action on a note by a purchaser of same at a receiver's sale that the purchaser thereof with other assets of the payee, a corporation, was for the purpose of taking merely the nominal title in plaintiff, while a stockholder of said corporation was permitted to manage the property as his own, and to reap the benefits of the purchase.—ANDERSON v. JOHNSON, Wis., 82 N. W. Rep. 177.

15. BILLS AND NOTES—Indorsement.—An indorsement on the back of a note, before its delivery, subjects the indorser merely to the same obligations as an ordinary indorsement, unless it is shown that the one making such indorsement did it as a maker.—CARRINGTON v. ODOM, Ala., 27 South. Rep. 510.

16. CARRIERS OF PASSENGERS—Arrest of Passenger.—That a conductor on defendant's railroad pointed out a passenger traveling in one of its cars to a sheriff, who arrested him at the instance of a sheriff of an adjoining State, did not render defendant liable therefor, where its servants took no part in such arrest, though the sheriff acted without authority of probable cause.—OWENS v. WILMINGTON & W. R. CO., N. Car., 35 S. E. Rep. 259.

17. CARRIERS OF PASSENGERS — Street Railways—Punitive Damages.—Though the conduct of defendant's conductor in wrongfully ejecting plaintiff from its street car which was such as to render the conductor liable to plaintiff for punitive damages, plaintiff could not recover such damages from defendant, unless defendant had authorized or ratified the conductor's conduct.—VASSAU v. MADISON ELEC. RY. CO., Wis., 82 N. W. Rep. 152.

18. CONSTITUTIONAL LAW — Legislative Powers.—The legislature has invested in the electors of a school district the power and authority to levy a tax for building purposes. It has limited and thrown restrictions around their actions regarding such matters for the protection of all taxpayers, and to prevent unjust and oppressive levies. In the exercise of the powers and authority given, and within the limitations defined by statute, the courts cannot interfere solely on the ground that such actions may be regarded as unwise or improvident, or that conclusions have been reached which, by others, may be deemed improper under the conditions existing and the circumstances surrounding the actions complained of.—EIKENBARY v. PORTER, Neb., 82 N. W. Rep. 108.

19. CONTRACTS—Sales—Time the Essence.—When one agrees with another to deliver to the latter, during a considerable period, a specified commodity by installments, as required, with no limit as to quantity, at designated prices, "payable monthly," time, relatively to the matter of making payments, is of the essence of the contract.—SAVANNAH ICE-DELIVERY CO. v. AMERICAN REFRIGERATOR TRANSIT CO., Ga., 35 S. E. Rep. 280.

20. CONVERSION — Confusion of Goods.—Defendant made separate contracts with plaintiff, an engraver, to cast dies and print advertising folders. Plaintiff contracted with a third party to print and bind the folders, requiring the printer to print 80 more copies than defendant had ordered, which plaintiff intended to use to advertise his business as an engraver. By mistake the printer delivered all the folders to defendant, and he refused to deliver the 80 copies to plaintiff on demand. Held that, plaintiff having been guilty of a breach of trust in procuring the printing of such extra copies, which had become so mixed with defendant's property as to be incapable of identification, defendant could not be required to separate them from his own, and was not liable for their conversion.—LEVYEAU v. CLEMENTS, Mass., 56 N. E. Rep. 735.

21. CORPORATIONS — Contracts.—Contracts made by one corporation are not binding upon another corporation merely because the stock in both is owned by the same persons.—WAYCROSS AIR LINE R. CO. v. OFFERMAN & W. R. CO., Ga., 35 S. E. Rep. 275.

22. CORPORATIONS — Dissolution. — A dissolved domestic corporation may, after such dissolution, prosecute any suit in its corporate name in the same manner and with like effect as if the corporation had not ceased to exist.—SCHMIDT & BRO. CO. v. MAHONEY, Neb., 82 N. W. Rep. 99.

23. CORPORATIONS—Rights of Third Parties Dealing with Officers.—A bank which held the individual note of the president of a business corporation received a payment thereon by his direction from a debtor of the corporation. The president was sole manager of the corporation, and the owner of the greater part, if not all, of its stock, and treated its business and property as his own, without objection from any one. Held, that the bank was entitled to retain such payment without prejudice to its right to receive a dividend equally with other creditors, upon a claim it held against the corporation, from a receiver appointed to wind up its affairs in insolvency.—MALCOMSON v. WAPPOO MILLS. U. S. C. C., D. (S. Car.), 99 Fed. Rep. 633.

24. CREDITORS' BILL—Judgment Creditors—Rights.—A judgment creditor who has acquired a lien on an equity of redemption owned by the judgment debtor cannot maintain a bill to have the premises sold, and the proceeds applied first to the payment of the mortgage indebtedness, and the balance to the satisfaction of his judgment, since such proceeding would in effect be to force the mortgagee to foreclose.—TURRENTINE v. KOOPMAN, Ala., 27 South. Rep. 522.

25. CRIMINAL EVIDENCE — Homicide—Confessions.—While a wife, save as expressly provided by statute, is not a competent witness for or against her husband when he is on trial for a criminal offense, a married woman is not rendered incompetent to testify on the trial of one not her husband because the latter may be in jail "under a commitment warrant charging him with" the identical offense for which the other is being tried.—FULLER v. STATE, Ga., 35 S. E. Rep. 293.

26. CRIMINAL EVIDENCE—Rape—Complaint by Prosecutrix.—An exception to the general rule of evidence is that, when the complaint of the prosecutrix is so recent or of such a character as to be a part of the *res gestæ*, the particulars thereof are admissible, as a part of the case in chief, in a prosecution for rape.—STATE v. NEEL, Utah, 60 Pac. Rep. 510.

27. CRIMINAL LAW—Cruelty to Animals.—Code 1896, § 5093, inflicting a punishment on any one who shall torture, torment, cruelly beat, mutilate, or cruelly kill, any animal, etc., has no application where defendant shot and instantly killed a dog, since the purpose of the statute is to prevent unnecessary tortue and cruelty to animals, and not the killing of them.—HORTON v. STATE, Ala., 27 South. Rep. 468.

28. CRIMINAL LAW—Homicide—Instructions.—Where accused killed deceased with a ball bat, an instruction that malice aforethought means an intention to kill, and that where such means are used as are likely to produce death the legal presumption is that death was intended, was erroneous, since such presumption was one of fact for the jury.—NILAN v. PEOPLE, Colo., 60 Pac. Rep. 485.

29. CRIMINAL LAW—Reasonable Doubt—Definition.—A charge that a reasonable doubt is a doubt growing out of the evidence, for which a reason may be given, was confusing and misleading, and hence was properly refused.—AVERY v. STATE, Ala., 27 South. Rep. 505.

30. DEATH BY WRONNFUL ACT — Negligence.—Inasmuch as the evidence for the plaintiff would have supported a finding of negligence against the defendant, and did not necessarily require a finding that the plaintiff's husband could by the exercise of ordinary diligence have avoided the consequences to himself of such negligence, the case should have been submitted to the jury, and not disposed of by the granting of a nonsuit. The lines upon which the case should be tried are indicated in the opinion herewith filed.—CANNON v. CENTRAL OF GEORGIA RY. Co., Ga., 35 S. E. Rep. 311.

31. DEEDS—Cancellation—Fraud.—Where the consideration for a conveyance of land from mother to son was reasonable, and there was no fear, coercion, or appeal to the affection exercised to procure same, it was error for a court of equity to set it aside or interfere therewith.—MARKING v. MARKING, Wis., 82 N. W. Rep. 133.

32. DEED—Evidence—Ancient Instruments.—If A conveyed land to B by a deed, and the latter executed upon it a transfer purporting to convey the title back to A, and retained possession of the paper, and subsequently conveyed the land to C, this "transfer" was not admissible in evidence as an ancient document against one claiming under C, unless shown to have come from the possession of A, or some one claiming under him by virtue of the conveyance executed by him after the date of such transfer.—WILLIAMSON v. MOSLEY, Ga., 35 S. E. Rep. 302.

33. DIVORCE—Alimony—Lien.—A decree for alimony is a lien upon real estate, the same as a judgment at law, and is enforceable in like manner.—DUFRENE v. JOHNSON, Neb., 82 N. W. Rep. 107.

34. DIVORCE—Desertion — Cruelty.—That a husband is overbearing and unkind does not constitute such

cruelty as to be of itself a cause of divorce, or to convert the wife's leaving him into desertion by him. A husband whose overbearing and unkind treatment has caused her to desert him is not entitled to divorce on the ground of desertion, where he has not made advances and concession at a time and in a manner suitable to obtaining her return; and it cannot be assumed that they would have been unavailing, he having taken the ground, in what correspondence he had, that he had been wholly in the right, and she wholly in the wrong, and having simply demanded that she return. —HALL v. HALL, N. J., 45 Atl. Rep. 690.

35. EMINENT DOMAIN—Damages—Negligence.—Under Const. art. 16, § 8, providing that parties invested with the privilege of taking private property for public use shall make just compensation "for property taken, injured or destroyed by their works, highways or improvements," the injury which may be considered in proceedings to assess damages must be the direct, immediate, and necessary or unavoidable consequence of the act of eminent domain itself, irrespective of care or negligence in the doing of it; and, where the settling of the walls of a house on a lot not abutting on a street in which a subway is being made by a city to avoid a grade crossing of streets and railroad tracks could have been avoided by due care the remedy is by an action of trespass. Notice by viewers to assess damages, to appear before them, and appearance by him, give the viewers no authority to pass on questions of damage from negligence.—STORK v. CITY OF PHILADELPHIA, Penn., 45 Atl. Rep. 678.

36. EQUITY—Petition to Set Aside Judgment.—If an equitable petition filed for the purpose of setting aside a judgment overruling a motion for a new trial and of obtaining a new trial of the original case will lie at all, it certainly is not maintainable when it shows that the petitioner was guilty of any default or neglect on his part.—DONALDSON v. ROBERTS, Ga., 35 S. E. Rep. 276.

37. EVIDENCE—Deed—Contradiction by Parol.—One who is a stranger to a deed or other instrument in writing is not bound by any recitals of fact therein contained, and accordingly has the right to contradict the same by parol evidence, and show that the writing does not express the real truth of the transaction to which it relates.—DICKEY v. GRICE, Ga., 35 S. E. Rep. 291.

38. EVIDENCE—Non-expert Testimony — Sickness.—While it is proper to prove by witnesses who have not qualified as experts that a person was sick at a certain time, it is not competent to let such witnesses testify as to what the disease was with which the person was afflicted, since such knowledge requires expert skill.—DOMINICK v. RANDOLPH, Ala., 27 South. Rep. 481.

39. EXECUTION—Claim of Third Person.—When, on the trial of a claim to land levied on under an execution issued from a judgment rendered in an attachment case, it appeared that, after the declaration in attachment had been filed, the claimant, who was the father of the defendant in attachment, with knowledge that the attachment had been issued, and that the son had no other property than that in controversy in the claim case, took from him a deed thereto, it was error to direct a verdict in the claimant's favor, even though the entry respecting the attachment on the attachment docket did not embrace a description of the property.—DEVENEY v. BURTON, Ga., 35 S. E. Rep. 268.

40. EXECUTION—Liability of Trust Property.—When two persons receive a sum of money belonging to a minor, and invest the same in land, taking title to themselves, they have no beneficial interest in the property, but hold it as trustee for the minor; and it is not subject to an execution issued against such persons as principal and surety on a county treasurer's bond, notwithstanding that at the time the bond was executed such trustees were the apparent owners of the land.—HURST v. BOARD OF COM'RS OF ROADS AND REVENUES OF DEKALB COUNTY, Ga., 35 S. E. Rep. 294.

41. EXECUTION—Sale—Vacation.—Where a complaint, filed by firm creditors to set aside a sale of land under an execution in favor of an individual creditor of the surviving partner, alleged that the land was partnership property, that the firm was heavily indebted to complainant when dissolved by the death of one partner, that the land was conveyed to complainant to apply on its partnership debt, and that the defendant had notice of these facts, it was sufficient, and a general demurrer thereto was properly overruled.—FIRST NAT. BANK OF COOPERSTOWN, N. Y., v. STATE SAV. BANK OF IONIA, MICH., Mich., 82 N. W. Rep. 125.

42. FEDERAL COURTS—Jurisdiction—Amount in Dispute.—The amount in dispute, in an action for jurisdictional purposes in a federal court, is determined by the amount claimed by the plaintiff in his pleading, in good faith, although such claim is made under a mistake of fact, as subsequently shown by the evidence. —KUNKEL v. BROWN, U. S. C. C. of App., Fourth Circuit, 99 Fed. Rep. 593.

43. FRAUDS, STATUTE OF—Conveyance of Land.—A written agreement by which a promisor binds himself to convey to the promisee "four lots of timber, more or less," for a named consideration thereafter to be paid, is not, for want of description, such a written contract in relation to the sale of land as satisfies the statute of frauds. While parol evidence may be admitted to explain ambiguities in the description, it cannot be admitted to supply a description which is entirely wanting in the writing. Accordingly, where the promisee under such an instrument entered upon certain lands for the purpose of cutting and removing timber thereon, it was error to refuse to enjoin him from so doing, when he relied only on the terms of such written contract for his right to so do.—DOUGLASS v. BUNN, Ga., 35 S. E. Rep. 339.

44. FRAUDS, STATUTE OF—Memorandum of Sale.—A memorandum of a bargain of sale to the effect that the sellers can "spare" the purchaser a specified quantity of corn, to be delivered at a stated time, is not sufficient to take the sale out of the statute of frauds, since the word "spare" does not necessarily import a sale, and cannot be interpreted with certainty without parol evidence showing what the agreement between the parties was.—REDUS v. HOLCOMB, Miss., 27 South. Rep. 524.

45. FRAUDS, STATUTE OF—Oral Contract.—Where the parties were the joint owners of one tract of land, and had also a joint expectancy in another, and the plaintiffs conveyed their interest in the tract owned to defendants, in consideration of a verbal promise by defendants that on the vesting of the estate in expectancy they would convey their interest therein to the plaintiffs, such contract was within the statute of frauds, and not enforceable.—VICK v. VICK, N. Car., 35 S. E. Rep. 257.

46. FRAUDULENT CONVEYANCE — Bill to Set Aside.—Where a firm's creditors filed a bill against one of the partners to set aside a conveyance by defendant of property alleged to have been purchased with firm money as fraudulent, and to subject the property to the payment of complainants' claims, the other partner was not a necessary party defendant.—BROOKS v. LOWENSTEIN, Ala., 27 South. Rep. 520.

47. FRAUDULENT CONVEYANCE—Consideration.—Prior advances and services by grantee, not considered by the parties as creating any debt till the grantor was threatened with financial troubles, will not furnish a consideration for a deed, so as to render it other than voluntary, as against the grantor's creditors.—ASHMEAD v. BAYLOR, N. J., 45 Atl. Rep. 699.

48. FRAUDULENT CONVEYANCES — Evidence.—In the trial of an action in which a sale of property is questioned as having been made in fraud of the rights of creditors, it is proper to receive in evidence conversations of the vendor and vendee in negotiating and consummating contracts out of which arose the consideration for the alleged fraudulent transfer.—BENNETT v. MCDONALD, Neb., 82 N. W. Rep. 110.

49. FRAUDULENT CONVEYANCES — Knowledge of Grantee.—The conveyance by a failing debtor of practically all his property to one of his creditors in satisfaction of his debt, the difference between the amount of said debt and the agreed value of said property being paid to said debtor in cash, with knowledge on the part of such creditor that such sale will result in hindering, delaying and defrauding the other creditors in the collection of their debts, is void as to such other creditors. Alleged errors in the giving of instructions and in the introduction of evidence examined, and held insufficient to work a reversal.—HENNEY BUGGY CO. v. ASHENFELTER, Neb., 82 N. W. Rep. 118.

50. GARNISHMENT—Municipal Employee.—Money due to one under a contract with a municipality for the collection of garbage and the maintenance of the sanitary condition of the city is not subject to garnishment at the suit of a creditor of the contractor.—SKEWES v. TENNESSEE COAL, IRON & RAILROAD CO., Ala., 27 South. Rep. 434.

51. GUARDIAN AND WARD — Custody of Children.—Where the father of minor children, after the death of his divorced wife, in whose custody the children had been placed by a divorce six years previous, petitioned to be appointed their guardian, the evidence on which the divorce had been granted was competent to show that he was not a suitable person for the appointment. —MCCHESNEY v. DE BOWER, Wis., 82 N. W. Rep. 149.

52. HOMESTEAD EXEMPTION—Revaluation.—Where a trustee in bankruptcy, in setting off to the bankrupt the property claimed as his homestead, has adopted the value placed upon it by appraisers 15 years before, when it was allotted to the bankrupt as a homestead under process of a State court, but it appears that the property has since increased in value beyond the amount allowed as exempt by the laws of the State, the court of bankruptcy will direct the trustee to revalue the property, and set apart to the bankrupt so much thereof as shall not exceed in value the amount so allowed.—IN RE MCBRYDE, U. S. D. C., E. D. (N. Car.), 99 Fed. Rep. 686.

53. HUSBAND AND WIFE—Sales—Agency.—A purchase of a stock of goods by a husband with his wife's funds, under an agreement with her to act as her agent in purchasing for her, vests the title in her, though the seller has no knowledge of such agreement.—JONES v. CHENAULT, Ala., 27 South. Rep. 515.

54. HUSBAND AND WIFE—Separate Property — Contracts.—Where coverture is pleaded by a married woman to defeat a recovery on a promissory note, it is proper for the plaintiff to set up in the reply any fact or facts which would avoid such defense—such as that the note was given for necessaries furnished the family of the defendant, and that an execution had been issued against the property of the defendant and returned unsatisfied, or that the note was executed with special reference to, and upon the faith and credit of, the separate estate, trade or business of the wife.—FULTON v. RYAN, Neb., 82 N. W. Rep. 105.

55. INJUNCTION—Bond—Damages.—Where an injunction was issued restraining the sale of lands under a mortgage and subsequently dissolved, no recovery could be had under the injunction bonds for rents collected during the life of the injunction, since it did not prevent the appointment of a receiver to conserve the rents.—CURRY v. AMERICAN FREEHOLD LAND MORTG. CO., Ala., 27 South. Rep. 454.

56. INJURIES TO ANIMALS—Negligence.—A cow feeding 10 feet from a railroad track, with her face toward the track in plain view of an approaching train, is in such obvious danger as to require the engineer to take precautions to avoid striking her, before she starts to walk onto the track.—CHATTANOOGA SOUTHERN R. CO. v. WILSON, Ala., 27 South. Rep, 486.

57. INSURANCE—Contract—Proof of Loss.—A fire policy requiring proofs of loss to be furnished within 60 days after the fire, and providing that no action should be maintained on the contract until the expiration of 60 days from the time of furnishing such proofs, contained no provision for a forfeiture in case the proofs were not furnished within the time specified. Held, that the time was not of the essence of the requirement in regard to furnishing proofs of loss, and that a failure to furnish such proofs within the prescribed period did not work a forfeiture of the insurer's claim for indemnity.—NORTHERN ASSUR. CO. v. HANNA, Neb., 82 N. W. Rep. 97.

58. INSURANCE — Mortgaged Property.—Civ. Code, § 2541, declares that insurance effected by the mortgagor in his own name on mortgaged property for the benefit of the mortgagee shall be deemed to be on the mortgagor's interest thereon. A mortgagor insured property under a policy providing that the loss should be paid to the mortgagee, who thereafter foreclosed the mortgage, and purchased the property for an amount sufficient to satisfy the mortgage, and the building insured burned before the expiration of the period of redemption. Held, that the mortgagee's interest in the policy was only as security for his debt, which was extinguished by the foreclosure sale, and hence he was not entitled to recover thereon.—REYNOLDS v. LONDON & LANCHSHIRE FIRE INS. CO., Cal., 60 Pac. Rep. 467.

59. INSURANCE—Policy—Waiver of Provisions.—A refusal to pay anything upon a policy of fire insurance, if made by an authorized agent of the insurer, is a waiver of a stipulation in the policy that the loss thereunder "shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss" have been received by the insurer. (a) There was in the present case sufficient evidence to show that the defendant's agent had authority to represent it in determining whether or not the policy should be paid.—WICKAM v. CONTINENTAL INS. CO., Ga., 35 S. E. Rep. 287.

60. INTOXICATING LIQUORS—Sale Without License—Prohibition.—While the offense of selling spirituous liquors without a license cannot be properly charged against one who sells such liquors in a county where prohibition exists under a valid statute, the offense in question can be committed in a county where prohibition does not exist, for the reason that a special act attempting to provide for prohibition therein was itself unconstitutional.—TINSLEY v. STATE, Ga., 35 S. E. Rep. 303.

61. JUDGMENTS—Assignment.—Promises by a debtor to pay the debt out of the proceeds of a judgment in a pending action, and to assign such judgment in payment of the debt, do not amount to an equitable assignment, as against other creditors, where there was no assignment in fact, and the debtor afterwards refused to execute such an assignment.—RUFF v. COMMERCIAL BANK OF LYNCHBURG, Va., U. S. C. C. of App., Fourth Circuit, 99 Fed. Rep. 650.

62. JUDGMENTS—Collateral Attack.—A decree of a State court can only be collaterally attacked in a federal court when entirely void, either for want of legal organization of the court, or of jurisdiction over either the subject-matter or the parties. The fact that such decree is void on its face, because uncertain and incomplete, does not render it subject to collateral attack; but the remedy must be sought in the court which rendered it, by proceedings for its vacation or by appeal from the decree.—WOOD v. CITY OF MOBILE, U. S. C. C., S. D. (Ala.), 99 Fed. Rep. 615.

63. JUDICIAL SALES — Action — Venue.—An equitable petition to set aside a sheriff's sale of land, cancel his deed made in pursuance thereof, and enjoin him from putting the purchaser in possession, must be filed in the county of the grantee's residence.—COKER v. MONTGOMERY, Ga., 35 S. E. Rep. 273.

64. LANDLORD AND TENANT—Oil Lease—Construction. —By a course of decision in West Virginia which has established a rule of property, it is settled that an oil and gas lease in which the sole compensation to the lessor is a share of the product is not a grant of property in the oil or in the land until oil is actually pro-

duced, but merely of the right of possession for the purpose of exploration and development; and there is always an implied, if not an expressed, covenant for diligent search and operation.—HUGGINS v. DALEY, U. S. C. C. of App., Fourth Circuit, 99 Fed. Rep. 606.

65. LANDLORD AND TENANT — Right of Tenant to Dispute Landlord's Title.—A tenant cannot dispute the title of his landlord and attorn to another while in the possession acquired by his contract of lease, and if, after the expiration of his term, he desires to contest the title of his landlord, he must first surrender the possession acquired from him.—GRIZZARD v. ROBERTS, Ga., 35 S. E. Rep. 291.

66. LICENSE—Peddling.—An ordinance providing for the licensing of all persons selling or offering to sell on the street, or soliciting orders from house to house, which makes no discrimination on any grounds, but bears on all persons impartially, is a valid exercise of the police power. An ordinance providing for licensing all persons selling on the streets or soliciting orders applies to one soliciting for a mercantile house doing business in another city, who pays a license.—BROWNBACK v. BURGESS, ETC. OF BOROUGH OF NORTH WALES, Penn., 45 Atl. Rep. 660.

67. LIFE INSURANCE — Default in Payment of Premium.—A policy of life insurance expressly stipulating that it "shall cease and determine" if any "premium be not paid when due" is not, in case of failure to pay a particular premium at the proper time, kept in force merely because the insurance company had, in the city of the residence of the insured, a habit or custom of receiving overdue premiums from other policy holders.—HAUPT v. PHŒNIX MUT. LIFE INS. CO., Ga., 35 S. E. Rep. 342.

68. LIFE INSURANCE—Policy—Proceeds.—Defendant's intestate while insolvent took out a life insurance policy for his parents' benefit, giving his note for a part of the premium, and for the balance gave his personal bank check to the agent, who paid the insurance company and retained the check as his own. On intestate's death, the check remaining unpaid, defendant took it up with his own funds. Held that, the policy being a gift, the beneficiaries took it subject to the rights of the creditors, and it was immaterial that the check was paid by defendant, as the right of the creditors in the proceeds arose immediately on intestate's death.—LEHMAN v. GUNN, Ala., 27 South. Rep. 475.

69. LIMITATION—Account Stated — New Promise.—Where a debtor, at the foot of an open account on the books of his creditor, subscribes an acknowledgment of the correctness of the account, stating the amount, such acknowledgment constitutes a new promise sufficient to remove the bar of the statute of limitations.—TENNESSEE BREW. CO. v. HENDRICKS, Miss., 27 South. Rep. 526.

70. LIMITATIONS—What Law Governs.—Code Ga. 1882, § 2916 (Code 1895, § 3766), providing that all suits for the enforcement of rights accruing to individuals under statutes, "acts of incorporation," or by operation of law, shall be brought within 20 years after the right of action accrues, and not the statute of limitations in Maryland, applies to an action in Maryland against a stockholder in a Georgia corporation to enforce his liability as stockholder as created by the charter of the corporation, within the rule that, where a statutory liability is sought to be enforced, and the statute prescribes the period of limitation, the law of the forum, where contrary thereto, does not govern.—BRUNSWICK TERMINAL CO. v. NAT. BANK OF BALTIMORE, U. S. C. C. of App., Fourth Circuit, 99 Fed. Rep. 635.

71. LIMITATION OF ACTIONS — Real Estate—Equitable Lien.—A creditor cannot, for the purpose of collecting a debt which has become barred by the statute of limitations, maintain against his debtor an action having for its object the enforcement of an equitable lien on land arising from an absolute conveyance thereof to the creditor and a contemporaneous parol agreement that he was to hold the title as security for the debt.—STORY v. DORIS, Ga., 35 S. E. Rep. 314.

72. MALICIOUS PROSECUTION—Probable Cause—Question of Law.—Since probable cause in an action for malicious prosecution is a question of law, a definition as to what constitutes it should not be given to the jury.—SCRIVANI v. DONDERO, Cal., 60 Pac. Rep. 463.

73. MANDAMUS — When Granted.—*Mandamus* will not issue to compel a court to issue an injunction not presently necessary for the conservation of relator's rights.—STATE v. LAND, La., 27 South. Rep. 433.

74. MASTER AND SERVANT — Fellow-Servants.—A telegraph operator at a railroad station, charged with duties in connection with the operation of trains on the road, and the engineers of such trains, are fellow-servants at common law, and the railroad company is not liable for the death of an engineer in a collision, due to the negligence of an operator in failing to report the passing of a train at his station.—ILLINOIS CENT. R. CO. v. BENTZ, U. S. C. C. of App., Sixth Circuit, 99 Fed. Rep. 657.

75. MASTER AND SERVANT — Fellow Servants — Negligence.—Two persons subject to control and direction by the same general master, is the same common object, are fellow-servants, and, if one is injured by the negligence of the other, the master, save when by statute otherwise provided, is not liable, although the negligent servant has the right to direct the work of the other.—HAMBY v. UNION PAPER MILLS CO., Ga., 35 S. E. Rep. 297.

76. MASTER AND SERVANT—Negligence—Defective Appliance.—It was negligence for a street-railway company to furnish its employees with an electric car which the evidence showed started with a lunge when the current was turned on, and which required its employees and passengers to brace themselves carefully to avoid being hurt upon its starting.—MURDOCK v. OAKLAND, ETC. ELEC. RY. CO., Cal., 60 Pac. Rep. 469.

77. MASTER AND SERVANT — Parent and Child—Negligence.—Where a minor servant is injured in the service of his employer through the negligence of the latter, his parent cannot maintain a common-law action for damages for loss of services and expenses incurred about his cure, without showing that the act of employment was wrongful.—WOODWARD IRON CO. v. COOK, Ala., 27 South. Rep. 455.

78. MASTER AND SERVANT — Personal Injuries—Pleading.—Where plaintiff alleged that he was employed for no other purpose than to operate machinery in defendant's mill and work on certain articles, and that he was ordered to repair certain machinery; that the work was different from, and more dangerous than, the work he was employed to do; that defendant knew the danger; and that, while doing the work, plaintiff was injured through no negligence of his own,—the complaint stated a cause of action.—ERVIN v. EVANS, Ind., 56 N. E. Rep. 725.

79. MORTGAGES—Foreclosure.—A mortgagee who proceeds to sell the mortgaged premises under a decree of foreclosure waives his right to appeal from that part of the decree which directs that the sale shall be made subject to a lien adjudged to be prior to the mortgage.—MALE v. HARLAN, S. Dak., 82 N. W. Rep. 179.

80. MORTGAGES—Pleading.—In an action to foreclose a mortgage, a complaint alleging that one of the parties defendant claimed some interest in the premises, accrued since the lien of plaintiff's mortgage, stated a cause of action as against such party.—HENDERSON v. WILLIAMS, S. Car., 35 S. E. Rep. 261.

81. MUNICIPAL BONDS—Estoppel by Recitals.—A recital in negotiable municipal bonds, by the authorities authorized to issue such bonds upon certain conditions, that all such conditions have been complied with, is conclusive as to the regularity of all proceedings precedent to their issuance in favor of a *bona fide* holder.—PICKENS TP. v. POST, U. S. C. C. of App., Fourth Circuit, 99 Fed. Rep. 659.

82. MUNICIPAL CORPORATIONS — Negligence—Defective Sidewalk—Notice.—A complaint against a city for injuries received by reason of a sidewalk being in a

decayed condition is not objectionable as not stating a cause of action, because it fails to expressly allege that the city had knowledge or notice of its condition for any specified period before the time of the injury, since municipal corporations are bound to exercise active vigilance to ascertain the condition of their streets and sidewalks, and if there has been opportunity to observe the defect by the performance of such duty, notice of its existence will be imputed.—CITY OF EVANSVILLE v. FRAZER, Ind., 56 N. E. Rep. 729.

83. MUNICIPAL CORPORATIONS — Officers—Removal.—Under Burns' Rev. St. 1894, § 3476, authorizing the common council to appoint a city attorney, and declaring that all city officers shall hold their respective offices for four years, "those appointed by the council being subject to removal at its pleasure after the first general election on the first Tuesday in May," a city attorney may be removed from office by the common council at any time after his appointment, without notice or trial, notwithstanding *Id.* § 3536, relating to the removal of officers, requires the council to provide a mode in which charges shall be preferred and heard.—STATE v. CITY OF SOUTH BEND, Ind., 56 N. E. Rep. 721.

84. MUNICIPAL CORPORATIONS—Sidewalks—Injuries.—There is no obligation upon the authorities of a municipal corporation, towards any one of its citizens, to exercise the legislative discretion with which they are invested to enact ordinances prohibiting any specific act concerning the streets and sidewalks of the town. Such matters are left to their discretion, and a right of action against a city does not accrue to one who was injured by a person riding a bicycle on the sidewalk, because the authorities had failed to prohibit such riding.—TARBUTTON v. TOWN OF TENNILLE, Ga., 35 S. E. Rep. 282.

85. MUNICIPAL CORPORATIONS—Trespass of Officers.—A municipal corporation is not civilly liable for the acts of its officers appointed to act for the corporation which in their nature are wholly and necessarily outside of the powers of such officers, but such unauthorized acts may be adopted and ratified by other officers of such corporation, acting upon a matter or regarding a subject within the scope of their general powers and authority, although such unauthorized acts, in the manner performed, constituted a trespass, and, when so adopted and ratified, the corporation would be liable for the damages occasioned thereby.—CITY OF OMAHA v. CROFT, Neb., 82 N. W. Rep. 120.

86. NEGLIGENCE—Bailee's Negligence.—Where property in possession of a bailee, and being used in accordance with the terms of bailment, is injured by a third party and the bailee's negligence contributed to the injury, his negligence is imputable to the bailor.—ILLINOIS CENT. R. CO. v. SIMS, Miss., 27 South. Rep. 527.

87. PARTNERSHIP — Contribution of Property.—After expiration of the year for which a limited partnership was formed, at which time its assets were $102,000 and its liabilities $63,000, the members thereof, without paying its debts or obtaining consent of its creditors, took $60,000 worth of its property, consisting of milling machinery, fixtures, and stock, all of which was subject to the claims of its creditors, and attempted to form a new limited partnership; its articles giving its capital stock at $60,000, all paid in by said machinery, fixtures, and stock, and contributed by the partners. The new partnership made payments and confessed judgments to the creditors of the old partnership. Held, that there was not a contribution of property according to its value, so that the members of the new partnership were liable as general partners to its creditors.—LEE v. BURNLEY, Penn., 45 Atl. Rep. 668.

88. PARTNERSHIP—Death of Partner—Continuance of Business.—Generally every partnership is dissolved by the death of one of the partners, where the partnership articles do not stipulate otherwise; yet any partner may by his will provide for the continuance of the partnership after his death, and in making this provision he may bind his whole estate, if the language of the will is clear and unambiguous that he intended to make his general assets liable for all debts contracted in continuing the trade after his death.—FERRIS v. VAN INGEN, Ga., 35 S. E. Rep. 348.

89. PARTNERSHIP—Transfer of Assets to Corporation—Creditors.—While the firm of W & S was indebted to a certain creditor, S sold his interest to G, who failed to pay the agreed consideration, and who sold to A, who refused to pay the consideration. After the firm became insolvent a newly organized corporation received its assets, and in consideration therefor agreed to pay the firm debts, and issued stock to W and A, and to one who had loaned money to the firm after the debt to said creditor had been contracted. Held, that a sale of the corporate assets, acquired from the firm, under a judgment obtained by the creditor against the firm of W & S, after the formation of the corporation, transferred a valid title, as against a receiver of the corporation who was appointed at the day of the sale, in proceedings commenced after the judgment was rendered where the corporation had contracted no new obligations.—MULFORD v. DOREMUS, N. J., 45 Atl. Rep. 688.

90. PRINCIPAL AND AGENT—Authority—Contract.—A civil engineer, who surveyed and staked out the route of a railroad, and who had personal supervision of the construction of the road, and authority to change and modify the grade, may bind the company to pay for extra work ordered by him to be done by a subcontractor who has contracted to do certain work according to specification prepared by the engineer, though he had no actual authority to contract for such extra work, since such authority will be implied as within his apparent authority, and is a sufficient predicate for the introduction of evidence of his acts and statements in an action against the company for such work.—LAFAYETTE RY. CO. v. TUCKER, Ala., 27 South. Rep. 447.

91. PROCESS—Summons—Proof of Service.—A return by a constable on a justice's summons reciting that he served the "within summons on L, president," on a certain date, is insufficient proof of service on a corporation on which to enter a default judgment.—HOFFMAN v. ALABAMA DISTILLERY & FEEDING CO., Ala., 27 South. Rep. 485.

92. PUBLIC LANDS—Contests.—Where adverse parties are residing upon a tract of public land, and each claiming priority of settlement, and the entree of the contestee is cancelled by the land department, and the contestant allowed to make homestead entry thereof, the latter entryman is entitled to the full and undisturbed possession of such tract as against the unsuccessful contestee; and mandatory injunction is a proper remedy to enforce the rights of the entryman.—MCDONALD v. BRADY, Okla., 60 Pac. Rep. 509.

93. REMOVAL OF CAUSES — Diversity of Citizenship.—Where a bill filed in a State court against a stockholder in a corporation shows that the only question involved is the ownership of the stock held by such defendant, the corporation is not a necessary party, and its joinder as a defendant will not prevent the removal of the cause by the defendant stockholder, where the requisite diversity of citizenship exists between him and the complainant.—HIGGINS v. BALTIMORE & O. R. CO., U. S. C. C., W. D. (Penn), 99 Fed. Rep. 640.

94. REMOVAL OF CAUSES — Jurisdiction.—While the jurisdiction acquired by a federal court over a suit removed from a State court is, in a limited sense, derivative, so that such court acquires no jurisdiction where the State court had none over the subject-matter, yet, where the State court had jurisdiction of the cause of action stated in the declaration, the fact that the defendant, after removal, pleads a defense of which the State court could not have taken cognizance, because based on a statute which the courts of the United States are alone empowered to administer, does not deprive the federal court of jurisdiction.—LEHIGH VAL. R. CO. v. RAINEY, U. S. C. C., E. D. (Penn.), 99 Fed. Rep. 596.

95. SALE — Conditional Sales.—Defendant sold a mill to A and G for a price payable in monthly installments, under an agreement that they should have possession of the property, but that the title should be in defendant until the price was paid. The buyers sold the mill without defendant's knowledge, taking notes for the price, secured by a chattel mortgage on the mill, which they assigned to plaintiff. Held, that defendant, having gained possession of the mill, was entitled to hold it as against such assignee, since the buyers had no right to sell or incumber the mill so as to defeat her title thereto, under the conditional sale.—SEARS v. SHROUT, Ind., 56 N. E. Rep. 728.

96. SALE—Easement — Misrepresentations.—Where, in a suit to collect a balance due on the purchase price of lands, defendant claimed damages arising from plaintiff's misrepresentations as to an easement appurtenant to the property, defendant need not show that the agreements as to the easement were in writing, since an easement once created by a covenant running with the land will pass to those subsequently taking title in privity with the grantee, by the sale and conveyance of the land itself, without mention of the easement, and hence the statute of frauds has no application.—NOOJIN v. CASON, Ala., 27 South. Rep. 490.

97. SALE—Warranty — Breach.—Where a seller of vehicles warranted them, and agreed to repair certain defects, the buyer had the option of rescinding the sale, and returning the defective vehicle, or of retaining it, and pleading the defects by way of recoupment, when sued for the price, though he did not notify the seller thereof.—PARRY MFG. CO. v. TOBIN, Wis., 82 N. W. Rep. 154.

98. SALES—Warranty—Waiver of Damages.—When a vendee, for a valuable consideration, and with full knowledge of all the facts, executes, in writing, a waiver of all damages, supposed or real, that he may have against his vendor upon a contract of warranty, he is bound by its terms.—AULTMAN & TAYLOR CO. v. DONNELL, Kan., 60 Pac. Rep. 482.

99. SCHOOLS—Teachers — Contract.—In an action on an alleged contract employing plaintiff to teach defendant's school on the same terms for which he had taught it the previous year, the only evidence relative to compensation being plaintiff's statement that he thought it was two dollars per day, and that that was the price paid the privious year, there was no contract shown, and plaintiff was not entitled to recover, since evidence of compensation for a previous year could not be received as evidence of what he was to receive under the alleged contract.—JACKSON SCHOOL TP. v. GRIMES, Ind., 56 N. E. Rep. 724.

100. SPECIFIC PERFORMANCE — Contract to Maintain Railroad Station.—Where a railroad company, in consideration of a conveyance by plaintiff of a right of way through his land, agreed to establish and maintain a station on his land, plaintiff to operate the station and receives fees therefor, and did maintain such station for a period of years, after which it refused to do so longer, plaintiff's remedy is by an action at law, and a bill for specific performance will not lie.—WILLSON v. WINCHESTER & P. R. CO., U. S. C. C. of App., Fourth Circuit, 99 Fed. Rep. 642.

101. TAXATION — Delinquent Personal Tax. — Since, under Laws 1893, § 40, taxes assessed against personal property become a debt to the township in which they are assessed, cannot be collected by the State or county, and are enforceable only by such township in a suit at law, the township is not entitled to refuse to pay over the State and county's portion of taxes assessed against personal property, though delinquent and unpaid.—CITY OF MUSKEGON v. MUSKEGON COUNTY, Mich., 82 N. W. Rep. 131.

102. TENANCY IN COMMON—Repairs—Liability.—Where plaintiff and defendant were co-tenants of a building which it became necessaryto repair, and defendant refused to assist, there being no statute creating liability, plaintiff could not maintain an action at law to recover from defendant a proportionate share of money expended for repairs.—MERCHANTS' BANK OF FLORENCE v. FOSTER, Ala., 27 South. Rep. 513.

103. TRUSTS—Constructive.—Where a policy on decedent's household furniture, payable to the widow, was collected by the administrator and the proceeds used by him in building a house on a lot in which he and others had an undivided interest, a constructive trust arose in the widow's favor for the money so used.—MOORE v. MCLURE, Ala., 27 South. Rep. 499.

104. TRUSTS—Reservation of Power — Revocation.—Where a trust deed contained a reservation of power to revoke or modify the same by a deed of the grantor to be recorded in a certain city recorder's office, under Civ. Code, § 2280, providing that a power of revocation reserved in a trust should be strictly pursued, the trust could not be revoked by the grantor's will.—CARPENTER v. COOK, Cal., 60 Pac. Rep. 475.

105. VENDOR AND PURCHASER — Option.—Plaintiffs had given one J a contract to convey certain land. Afterwards they brought suit to foreclose same, and, on appeal by said J from a judgment of foreclosure, defendant became surety on his appeal bond. After affirmance of the judgment, J procured an option on the land for his wife. Later he obtained a further writing, which he claims constituted a land contract to his wife for the purchase of the land within 60 days. It, however, was not signed by the wife or in her behalf, and was nothing more than an extension of the option to purchase the land. The option was not exercised within the time limited. Held, the defendant's liability on his undertaking was not altered or destroyed by the option negotiations.—NELSON v. STEPHENS, Wis., 82 N. W. Rep. 163.

106. VENDOR AND PURCHASER — Vendor's Lien—Waiver.—Complainant sold C a tract of land for $250, receiving all but $89 of the purchase money. At C's request he executed a deed to L, but later refused to deliver the same until the balance of the purchase money was paid. Thereupon complainant and C entered into an arbitration agreement, by which it was to be determined what remained unpaid upon the land. An award was made directing complainant to deliver the deed to L, and that C pay complainant $5.20 within seven months. Complainant delivered the deed, but C failed to pay the award. Held, that complainant had not waived his vendor's lien, but could enforce same in equity.—CHASTAIN v. HAINES, Ala., 27 South. Rep. 500.

107. WAREHOUSEMEN—Fraudulent Receipts — Estoppel.—A warehouseman, whose agent fraudulently issues a receipt for grain, which has not been received, is estopped to deny that the grain mentioned in the receipt has been received, as against a *bona fide* holder for value.—FLETCHER v. GREAT WESTERN ELEVATOR CO., S. Dak., 82 N. W. Rep. 184.

108. WILLS—Dying Declarations as Nuncapative Will.—Mere declarations of one in a dying condition, to the effect that he wanted his property to go to a designated person, and wished those present "to see to it," if made solely for the purpose of having a written will prepared, and not with the intent or design that the words spoken should themselves operate as a testamentary disposition of the decedent's property, do not constitute a nuncupative will.—KNOX v. RICHARDS, Ga., 35 S. E. Rep. 295.

109. WILLS — Extraneous Instrument — Reference.—That a deed of trust referred to in a subsequent will was not present at the execution of the will, and not attested by witnesses, did not prevent the deed being considered as a portion of the will.—IN RE WILLEY'S ESTATE, Cal., 60 Pac. Rep. 471.

110. WILLS — Validity — Existence of Heir.—Section 3262 of the Civil Code is not applicable to a case in which it appears that the testator not only knew that a given person existed, and claimed to be his nearest of kin, but had the full time and ample opportunity, before executing his will, for ascertaining with certainty the truth or falsity of the claim of relationship.—YOUNG v. MALLORY, Ga., 35 S. E. Rep. 278.